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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1957.

STATE OF GEORGIA,
WESTERN & ATLANTIC RAILROAD, and
LOUISVILLE AND NASHVILLE RAILROAD COMPANY, - - - - - Appellants,

vs.

UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION,
Et Al., - - - - - - - - - Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA.

JURISDICTIONAL STATEMENT.

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STATE OF GEORGIA,
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COMPANY, - - - - - - - - *Appellants,*

v.

UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION,
ET AL., - - - - - - - - - *Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA.

JURISDICTIONAL STATEMENT.

Appellants appeal from the judgment of the United States District Court for the Northern District of Georgia, entered on October 21, 1957, sustaining an order of the Interstate Commerce Commission, and submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

OPINION BELOW.

The opinion of the District Court for the Northern District of Georgia, Atlanta Division, is reported in 156 F. Supp. 711. A copy of the opinion is attached hereto as Appendix A. The decision of the Interstate Commerce Commission (Division 4) is reported in 295 I. C. C. 363, and is reproduced as Appendix B hereto. The Commission's orders of September 4, 1956 and February 12, 1957, are reproduced as Appendix C and Appendix D, respectively.

The district court's opinion was entered as its order.

JURISDICTION.

This suit was brought by appellants under Title 28, United States Code, Sections 1336, 1337, 1398, 2321, 2322 and 2325, to annul and set aside orders of the Interstate Commerce Commission. The judgment of the three-judge district court dismissing the complaint was entered on October 21, 1957, and notice of appeal was filed in that court on December 12, 1957. The jurisdiction of the Supreme Court to review this decision on direct appeal is conferred by Title 28, United States Code, Sections 1253 and 2101(b). Jurisdiction of this Court to review the judgment on direct appeal in this case is sustained by *Thompson* v. *United States*, 343 U. S. 549, 554 (1952), and *Dixie Carriers* v. *United States*, 351 U. S. 56, 58 (1956).

THE STATUTES INVOLVED.

The questions arise under the provisions of the Interstate Commerce Act governing construction of new lines of railroad and extensions of existing lines, and spur, industrial and other trackage. 41 Stat. 477; 49 U. S. C., Secs. 1(18) and 1(22). The statutes are reproduced in full in Appendix E. The specific provisions involved in this action are:

> Section 1(18). "No carrier by railroad subject to this chapter shall undertake the extension of its line of railroad . . . unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction . . . of such additional or extended line of railroad . . . ."
>
> Section 1(22). "The authority of the Commission conferred by paragraphs (18) to (21), both inclusive, shall not extend to the construction . . . of spur, industrial, team, switching, or side tracks, located or to be located wholly within one State . . . ."

QUESTIONS PRESENTED.

The questions arise from a proposal of appellants to construct trackage to a newly developed, limited area adjacent to their main-line right of way at Boyce, Tennessee. This right of way is jointly occupied by their main line and by the parallel main line of the intervening appellee, Cincinnati, New Orleans & Texas

Pacific Railway,[1] under an easement granted by the owner, the appellant State of Georgia.[2] An industrial track, the same in character as the proposed trackage, was built by Southern, the easement carrier, from the joint right of way to the area, connecting with the industries located there. For many years the owner line has served and now serves the area and the same industries by means of a team track and by reciprocal switching[3] performed for it by the easement carrier as its agent.

The questions presented are:

1, Whether by reason of the rule relating to "invasion" by one railroad of the territory of another, promulgated in *Texas & Pac. Ry.* v. *Gulf., etc., Ry.*, 270 U. S. 266 (1926), the proposed trackage is an extension of line within the meaning of Sec. 1(18) of the Interstate Commerce Act rather than a spur or industrial track within Sec. 1(22), and thus, whether the Interstate Commerce Commission had jurisdiction over its construction.

---

[1]Constructed by the Cincinnati Southern Railway, now under lease to the Cincinnati, New Orleans & Texas Pacific Railway. The latter is a member line of the Southern Railway System. All are hereinafter referred to, individually or collectively, as "Southern" or "easement carrier".

[2]The State of Georgia, as owner, constructed the Western & Atlantic Railroad which, until recently, was continuously operated under lease by The Nashville, Chattanooga & St. Louis Railway. The latter was merged with the Louisville and Nashville Railroad Company which today operates the Western & Atlantic as its main line between Chattanooga, Tennessee, and Atlanta, Georgia. These lines and the State of Georgia are hereinafter referred to, individually or collectively, as "appellants" or "owner line".

[3]See pages 15-16, *infra*, for definition and discussion of reciprocal switching.

(a) In the circumstances here present is the limited industrial area involved "new territory" to the owner line?

(b) Is the term "serve" as used by the Supreme Court in the *Texas & Pacific* case limited to service over trackage owned and operated by the railroad proposing the new construction, or does it include service by other means?

(c) Did the owner line, by deferring construction until economically justified, employing in the meantime the easement carrier as its agent to perform mere switching, forfeit its right to serve the area by its own trackage, and did the industries located there lose the right to such direct service?

2. Whether the proposed trackage, judged by established criteria other than the rule of invasion, would constitute a spur or industrial track excluded from the authority of the Commission by paragraph (22) of Section 1 of the Act.

3. Whether the evidence of record supports the district court's interpretation of the Commission's report as constituting a finding that the proposed construction "would either jeopardize the stability of earnings of one or the other roads, make unlikely an adequate return for one or the other on its investment or create such competition as would injure one of the two roads, and the harmful effect of such condition would be 'inimical to the public interest.'"

4. Whether the scope of the authority conferred upon the Commission by Section 1(18) of the Act, as

limited by paragraph (22), requires independent judicial determination unfettered by preliminary findings and conclusions of the Commission, and whether the district court abdicated its judicial function in holding that the facts bearing upon the jurisdictional question were not subject to its review.

(a) Is there a legal distinction between questions involving the exercise of administrative discretion by the Commission and those relating to its jurisdiction under the Act, requiring judicial determination of the latter unhampered by findings made by the Commission?

(b) Do findings by the Commission on the issue of public convenience and necessity under Section 1(18) of the Act preclude independent judicial inquiry and determination of the facts by the court on the issue of Commission jurisdiction?

STATEMENT OF THE CASE.

The Western & Atlantic Railroad, extending from Atlanta, Georgia, to Chattanooga, Tennessee, was constructed by its present owner, the State of Georgia, and placed in service in 1850 (Tr. 197).[4] It is regarded by the State as its most valuable piece of property, care of which is entrusted to the Georgia Public Service Commission (Tr. 198). The main line passes through Boyce, Tennessee, a suburb of Chattanooga about five miles from appellants' station in that city. It has been

[4] "Tr." designates the transcript of the record of the hearing before the Commission, a certified copy of which is a part of the record in this appeal.

operated continuously since 1883 by the appellant Louisville and Nashville Railroad Company or The Nashville, Chattanooga & St. Louis Railway,[5] under various leases from the State of Georgia (Tr. 198).

In 1879 Georgia granted to the Cincinnati Southern Railway, lessor of the intervening appellee, Cincinnati, New Orleans & Texas Pacific Railway, an easement for the construction of that company's main line upon Western & Atlantic Railroad's right of way from Boyce into Chattanooga, conditioning the grant upon maintenance by the easement carrier of its track at the same grade as that adopted by the Western & Atlantic (Exhibit H-3, Tr. 204, 213). The easement carrier's main line between those points is located on the west side of appellants' main line and runs parallel with it. Appellee Cincinnati, New Orleans & Texas Pacific Railway is now a part of the Southern Railway System (Tr. 236).

The area in which appellants' proposed trackage is to be constructed roughly approximates a triangle the base of which is formed by their right of way and the other two sides by the Tennessee River and Chickamauga Creek (Appendix F). Until recent years it was subject to flooding of the river and creek and was unsuitable for large industry (Tr. 22). However, upon completion of Chickamauga Dam by the Tennessee Valley Authority, the danger of flood was overcome (Tr. 221) and through promotional activities of the

[5]Merged with Louisville and Nashville Railroad Company by agreement approved by the Commission in *Louisville & N. R. Co. Merger*, 295 I. C. C. 457 (1957). [6]Louisville and Nashville Railroad Company was substituted as party plaintiff in the district court.

Chattanooga Chamber of Commerce industrial development began in 1952 (Tr. 186, 190).

The Boyce industries comprise two groups—those in existence prior to 1952 and those established since that time. With one exception, all are located on an industrial lead of Southern called the "river track" (Tr. 320). The first group is composed of several small factories having no interest in the proposed new track and whose traffic has been and is inconsequential compared with that of the second—the recently located industries here involved seeking the track connection proposed by appellants (Tr. 130-1, 142-3, 174). All are served by both appellants and Southern. Track facilities of Southern consist of a spur running from the southwest end of its freight yard, serving only the Quaker Oats Company, and the "river track," leading from the opposite end of the yard to turn-outs connecting with the other industries (Appendix F).

Appellants' service in the Boyce area is rendered by two means: (1) by a public team track near the center of the community at which cars are received and delivered (Tr. 100, 107; Exhibit H-1, Tr. 40, 58), and (2) by reciprocal switching (Tr. 130, 132-3, 140, 142, 143, 172). Historically the area has been included in the Chattanooga switching district by tariff publication (Tr. 194; Exhibit H-2, Tr. 96, 127). Excepting the period between June 23, 1954, and October 25, 1957, appellants have for more than forty years served and are now serving the industries, both old and new, employing Southern as their agent to perform the neces-

sary switching.[6] The purpose of the proposed trackage is to enable appellants to improve, with their own facilities, the services they now provide (Tr. 25).

A graphic portrayal of the situation is given by map "A" of Appendix F. The trackage is to be projected from a passing track of appellants near Boyce for approximately .9 of a mile to the plants of Cramet, Inc. and Heavy Minerals Company; thence 1.12 miles to a connection with the industry tracks of Central Soya Company, and from that point continued for 2.02 miles to the plant of the Quaker Oats Company—a total distance of approximately 4.04 miles (Exhibit H-1, Tr. 40, 58). The main line of Southern will be crossed by a new bridge (Tr. 27).

The track will be used only for switching loaded and empty freight cars to and from these industries (Tr. 13). No train schedules will be offered and no through trains operated over the track, and none of the appurtenances necessary to main or branch line operation, such as buildings and loading platforms or telephone and telegraph service, will be provided. No station or agency will be established or agent maintained in connection therewith since the track, being the same in

[6]The noted interruption of service was brought about by the unlawful act of Southern in undertaking to exclude the Boyce industries from the Chattanooga switching district through tariff publication effective June 23, 1954. Upon complaint of the new industries the Commission ordered Southern to restore them to the district. I. C. C. Docket No. 31737, *Cramet, Inc.* v. *Alabama, G. S. R. Co., et al.*, 298 I. C. C. 439 (1956). This became effective October 25, 1957, and appellants' services were resumed on that date. The Commission's action was upheld in *Southern Railway Co., et al.* v. *United States, et al.*, 154 F. Supp. 562 (U. S. D. C. Va., 1957), which judgment was affirmed by this Court in Docket No. 579 on January 13, 1958.

character as other switching facilities in the Chattanooga switching district, will be under the supervision and control of appellants' agent at that point (Return to Questionnaire, p. 17; Tr. 15-16).

On May 27, 1955, in pursuance of the new industries' requests for direct track connection, appellants applied to the Interstate Commerce Commission for a certificate of public convenience and necessity authorizing the proposed construction under Section 1(18) of the Act. The State of Georgia and one of the industries intervened in support and the appellee Southern and its affiliates intervened in opposition. Finance Docket No. 18942, *Nashville, Chattanooga & St. Louis Railway, et al., Construction,* 295 I. C. C. 363 (1956). Before any action had been taken thereon by the Commission, appellants filed a motion to dismiss the application for lack of jurisdiction on the ground that the trackage would be a spur or industrial track expressly excluded from Commission authority by paragraph (22) of Section 1 of the Act.

The Commission held that the Boyce area is served exclusively by Southern; that the construction would constitute an invasion of Southern's territory; that the area is "new territory" to appellants and consequently, under the rule of *Texas & Pac. Ry.* v. *Gulf, etc., Ry.*, 270 U. S. 266, 278 (1926),[7] the track would be an extension of line (Appendix B-22). Accordingly, it overruled the motion to dismiss (Appendix C, Report and Order of September 4, 1956). By the same order the

[7]The rule and underlying reasons for it are quoted herein at pages 13-14.

application was denied. Appellants' petition of October 15, 1956, for reargument and reconsideration was denied by the entire Commission on February 12, 1957 (Appendix D).

This action was brought by appellants to annul and set aside the Commission's orders. Basing its judgment upon the Commission's findings, the district court dismissed the complaint, holding that the case is controlled by the construction placed upon the statute by this Court in the *Texas & Pacific* case (Appendix A-8). It found that the Boyce area is "new territory" to appellants; that the service appellants render to the industries in that area is not service in the sense in which this Court used the word "serve" in the rule cited; and concluded that the proposed trackage would be an extension of line subject to the Commission's authority under Section 1(18) (Appendix A-11).

In the lower court the appellees raised the question of the scope of the reviewing power of the court in determining the issue of Commission jurisdiction, insisting that it was bound by the Commission's findings of fact on that issue if any basis therefor could be found in the record. Appellants contended that the jurisdictional issue must be determined independently by the Court upon its own inquiry into the facts. This question the district court declined to decide, stating that the basic facts on which the jurisdictional question must be resolved "are supported by substantial evidence and are therefore not subject to review by this court" (Appendix A-3).

THE QUESTIONS ARE SUBSTANTIAL.

The Commission and the district court have so interpreted a rule of construction of this Court relating to the statutes governing railroad track construction as to deprive appellants of their right to serve with their own facilities an important segment of the public they presently serve by other means. A meaning is attributed to the rule which could not reasonably have been intended when formulated; moreover, the case out of which it grew was entirely different in fact and circumstance from that here presented.

Appellants were the first to provide railroad transportation at Boyce and subsequently permitted Southern's entrance there by granting it an easement to occupy jointly their right of way. From the beginning appellants continuously have held themselves out to serve the public at Boyce as the need for transportation by railroad has arisen. Only recently the area adjacent to the joint right of way became available to large industry requiring substantially increased railroad services, and immediately upon the beginning of its development appellants undertook to make provision therefor. They have always served the several small factories there and today serve them, as well as the recently established large industries, by a team track and through reciprocal switching. Notwithstanding these undisputed facts, and despite findings by the Commission and the district court that appellants have for many years served and today serve the area, both held that the area is "new territory" as to appellants

(Appendix A-11; Appendix B-11, B-22). The court held further that appellants' existing service is not the kind of service contemplated by the decision which is said to control this case (Appendix A-11). A misconception of the facts of both cases is largely accountable for these holdings.

1. The Texas & Pacific Case Does Not Control Here.

(A) NO PART OF THE BOYCE AREA IS NEW TERRITORY TO APPELLANTS.

Section 1(18) of the Act forbids construction of extensions of line by a railroad unless a certificate of public convenience and necessity has been obtained from the Commission. By Section 1(22) spur and industrial trackage located wholly within one state is removed from the Commission's authority.

The applicability of these statutory provisions is affected by the decision in the *Texas & Pacific* case wherein the concept of "invasion" of the territory of one railroad by another through construction of new trackage was introduced by this Court. It stated:

> "If the purpose and effect of the new trackage is to extend substantially the line of a carrier into *new territory*, the proposed trackage constitutes an extension of the railroad within the meaning of paragraph 18, although the line be short and although the character of the service contemplated be that commonly rendered to industries by means of spurs or industrial tracks." (270 U. S. at p. 278; emphasis supplied)

The reason for this ruling is found in the discussion immediately preceding it on the same page of the opinion where it is said:

> ". . . where the proposed trackage extends into territory *not theretofore served by the carrier,* and particularly where it extends into territory already served by another carrier, its purpose and effect are, under the new policy of Congress, of national concern. For invasion through new construction of territory adequately served by another carrier, like the establishment of excessively low rates in order to secure traffic enjoyed by another, may be inimical to the national interest." (Emphasis supplied)

From this it appears that applicability of the rule depends upon whether the territory sought to be reached is new to the carrier proposing the construction. If that carrier has served or is serving the industries in the area, then the rule cannot come into play. This is true because otherwise it would be necessary to hold that the carrier is invading its own territory. Both the history of railroad transportation service at Boyce and the performance of such service by appellants, as revealed in the record (Tr. 100, 107, 130, 132-3, 140, 142, 143, 172, 194, 202), refute the conclusions reached by the Commission and the district court that the territory involved is new to them and that the proposed construction would be an invasion.

The discussion in *Texas & Pacific* indicates a clear purpose to prevent raiding of established traffic of one railroad by another through new track construction

which might result in injury to one by diversion of traffic, or to both through destructive competition. Such reasoning is wholly inapplicable here because appellants are already sharing the traffic in an existing competitive situation. Their services are provided by their own team track and also through reciprocal switching over Southern's facilities. Service through reciprocal switching is the equivalent of actual service by appellants, the Commission having so held in *Crossfield Ice Co.* v. *Southern Ry. Co.*, 232 I. C. C. 795 (1939), where it said:

> "Reciprocal switching is the service which carriers perform for each other within a switching district or other defined area, in connection with which service the switching carrier does not receive a line haul. *The effect of reciprocal switching is to extend the rails of the line-haul carrier to all designated tracks within the area.*" (p. 795, emphasis supplied.)

Under reciprocal switching the traffic moves to and from the industries on appellants' bills of lading and under their tariffs. Appellants pay Southern to perform the switching. Southern does not enter into the transactions with the shippers in any way; it is simply appellants' agent for the purpose of switching and delivery. *Missouri Pac.* v. *Reynolds-Davis*, 268 U. S. 366, 369 (1925); *Automobiles to Southern Ports for Export*, 225 I. C. C. 225, 229 (1937). Appellants are liable for loss and damage occurring during such switching operations. *Missouri Pac.* v. *Reynolds-Davis, supra;* [44 Stat. 1448, 49 U. S. C. 20 (11)].

They are responsible as the originating carrier for damages resulting from misrouting. *Ezee Flow Corp. v. Illinois Central R. Co.*, 287 I. C. C. 281, 284 (1952).

Consonant with such prior holdings, the Commission found that through reciprocal switching, one of the Boyce industries which at the time of the hearing remained in the Chattanooga switching district following Southern's unlawful act in removing the Boyce area therefrom,[8] "has the services of all lines entering that city. . . . The evidence is that 1,500 carloads of such traffic were routed via the applicants' [appellants'] lines in 1954" (Appendix B-6). It also said: "For a period of at least 35 years prior to June 23, 1954, the Boyce area was included in the Chattanooga switching limits, and all railroads entering Chattanooga had access to the industries in that area through reciprocal switching arrangements with the Southern" (Appendix B-12). And referring to Quaker Oats Company, the Commission found that "The plant has the services of all lines of railroad entering Chattanooga under reciprocal switching arrangements".[9]

Despite these findings and contradictory thereto, the Commission held that the Boyce industries are served "exclusively" by Southern (Appendix B-22).

Upon review the district court held that while the appellant Louisville and Nashville Railroad does "in the broadest sense of the term" serve all the Boyce industries, it is not now serving the involved territory

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[8]See footnote 6, p. 9, *supra*.

[9]Service by appellants' team track at Boyce, although established in the record, was not even mentioned by the Commission.

"in the sense in which the court used the word 'serve' in the Texas and Pacific case," and therefore, the area is new territory to the L. & N. The court deduced "from the facts in the Texas & Pacific case that the use of the word 'served' there comprehended serving by means of its own substantial facilities," *i. e.*, its own tracks (Appendix A-12).

This Court did not there circumscribe the meaning of the word "serve" as used in its expression "where the proposed trackage extends into territory not theretofore served by the carrier" (270 U. S. at p. 278). But if any limitation of that term was implied, it could not logically have been so narrowing as to mean only service rendered by a railroad over its own tracks because that would ignore the quintessence of the rule —the consequences of *new* competition.

In view of the foregoing, the holding by the Commission that the Boyce industries are served exclusively by Southern must be rejected as being irreconcilably inconsistent with its own findings and contrary to the facts. Likewise, the holding of the district court that the Boyce area is new territory to L. & N. merely because L. & N. does not have trackage to the industries, while at the same time recognizing competitive service by that railroad, is fatally affected by the same infirmity.

(B) COMPETITION IS NOT A FACTOR IN APPELLANTS' PROPOSAL BECAUSE THEY ALREADY ACTIVELY COMPETE AS AN ORIGINATING CARRIER FOR THE BOYCE TRAFFIC.

Avoidance of destructive competition is the heart of the opinion and rule in *Texas & Pacific*. All of the subsidiary considerations noted in that opinion are related to it. Resistance to new track construction invariably is initiated by other carriers fearing a loss of traffic through what they regard as an encroachment of their territory. Invasion of one railroad's territory by another necessarily implies injection of new competition and that competition, as it may affect the public interest, must be taken to be the controlling consideration underlying the decision in that case. It was the distinguishing factor in *Union Pac. R. Co.* v. *Denver & Rio Grande Western R. Co.*, 198 F. 2d 854 (C.A. 10, 1952), wherein the Union Pacific, in an effort to escape the *Texas & Pacific* rule, relied upon *Missouri, K. & T. R. Co.* v. *Texas & N. O. R. Co.*, 172 F. 2d 768 (C.A. 5, 1949), holding the trackage there considered to be a spur. The court rejected the latter case as support for Union Pacific's position, stating:

> "But *there a competitive condition already existed between the two companies,* and by the construction of the proposed trackage one of them desired to improve its position and in that manner further intensify the competition." (p. 859, emphasis suppied.)

This is the precise situation at Boyce.

Appellants, as an originating line-haul carrier, are in direct competition with Southern for all of the Boyce

industries' traffic, a large volume of which is already being handled by them (Tr. 141). That the proposed construction would not create any new competition or effect a raiding of Southern's traffic was recognized by the district court in its statement that under reciprocal switching "L. & N. in practical effect obtains much of the advantage it would have from building its own facilities into this area,"[10] and in the further statement that "in the absence of a subsisting reciprocal switching agreement by the terms of which the *L. & N. can compete on substantially even terms with the Southern* on shipments into and out of the area in question the Commission would have given favorable consideration to the application of the plaintiffs [appellants] for permission to build their own tracks" (Appendix A-13-14).

While Southern attempted in 1954 to rid itself of this competition by unlawfully removing three of the four new industries at Boyce from the Chattanooga switching district, prior to that time such competition always existed under reciprocal switching. Appellants' competitive status was restored when the Commission ordered reinstatement of the Boyce industries to the switching district.[11]

In view of these facts, the findings that the area is new territory to the L. & N. and that the proposed construction would bring about harmful competition

[10]The Commission has held that *reciprocal switching places all the railroads entering Chattanooga in competition* for the business of every shipper. *Financial Relations, etc., L. & N. R. R. Co.*, 33 I. C. C. 168, 201 (1915).

[11]See footnote 6, p. 9, *supra*.

are contrary to the evidence and should be set aside. The reasoning of *Texas & Pacific* and the rule emerging therefrom are clearly inapplicable here.

(C) THE FACTS AND CIRCUMSTANCES GIVING RISE TO THE RULE WERE ESSENTIALLY DIFFERENT FROM THOSE INVOLVED AT BOYCE AND CONSEQUENTLY FURNISH NO BASIS FOR APPLYING IT IN THIS CASE.

The rule of *Texas & Pacific* was framed to deal with a set of facts and circumstances entirely dissimilar to those in this case; yet the district court held this case to be controlled by that rule. Only contrasts can be found in the respective situations shown by the drawings in Appendix F[12] and by the facts here and those stated in that opinion and in the Commission's report in the subsequent proceeding wherein the proposed construction was authorized. *Construction by G., C. & S. F. Ry.*, 131 I. C. C. 393 (1927). The major differences, briefly outlined, are:

(a) Whereas the Santa Fe (the applicant there) had no branch line running near or in the direction of any part of the industrial district at West Dallas (270 U. S. 275), the Boyce area lies adjacent to the right of way owned by appellants, which is also occupied by Southern's main line under an easement granted by appellants. It is equally the territory of one as of the other to whatever extent proximity and direction of main line may bear upon the issues.

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[12]Drawing A in Appendix F is based upon appellants' map Exhibit H-1 in the certified record made before the Commission. Drawing B in Appendix F is based upon a map appended to the brief of Gulf, Colorado & Santa Fe Railway in the *Texas & Pacific* case and may be found in this Court's "Transcripts of Records and File Copies of Briefs", 1925, Volume 63; Case No. 417.

(b) The industries at West Dallas were well established and of long standing, the first having been located about 27 years prior to the decision (131 I. C. C. 394). At Boyce, however, the four industries involved are new in the area, only one of them having completed its plant construction at the time appellants filed their application with the Commission. The other three had not begun to move any traffic, and of these, the plant of one is still under construction (Tr. 128-130, 168).

(c) The sole object of the proposed trackage in the *Texas & Pacific* case was found by the Commission to be to reach the existing traffic at West Dallas (131 I. C. C. 400), while at Boyce appellants' object is to perform with its own facilities the services required for the transportation of traffic it is now handling through Southern as its agent.

(d) In *Texas & Pacific* all traffic available to the proposed line would have been diverted from the existing carrier (270 U. S. 276; 131 I. C. C. 396), whereas here the situation is altogether different since L. & N. is now handling the traffic to and from the industries as an originating carrier.

(e) There, no competitive railroad service to the industrial area was present, the industries being served exclusively by the Texas & Pacific Railway. All traffic moved out of the district over its line as the originating carrier. The reverse is true at Boyce where appellants are today, and continuously for many years have been, an originating carrier in active competition with Southern for the available traffic.

(f) The industrial district involved in *Texas & Pacific* was not within the switching limits of Dallas (131 I. C. C. at p. 397) and consequently reciprocal switching was not available to other carriers, and the industries there were served exclusively by the *Texas & Pacific*. But the Boyce area is and for more than 40 years has been within the Chattanooga switching district, and every industry located in that area is, for all transportation purposes, located on the line of the appellants.

The differences between the physical and geographical situations and between the essential aspects, including the controlling factor of existing competition, render the *Texas & Pacific* case wholly inapposite in determining the status of appellants' proposed trackage at Boyce.

2. The Proposed Trackage Is Established To Be a Spur or Industrial Track Within the Terms of Paragraph (22) of Section 1.

Guides other than the *Texas & Pacific* rule have been devised by various courts and by the Commission for determining whether given trackage is an extension of main line or an industrial lead. However, a rule of thumb which may be followed generally in distinguishing between the two is that extensions relate to *main line* as contrasted with *terminal facilities* which include spurs, side, team, and industrial tracks. *Missouri, K. & T. R. Co.* v. *Texas & N. O. R. Co.*, 172 F. 2d 768, 769 (C. A. 5, 1949).

Other matters which have been regarded as indicating the nature of given trackage include the following.

The proposed trackage will not provide any of the appurtenances needful and used in operating main or branch lines, that is, passenger, telephone, telegraph, station or station agent's service, or loading platforms and other buildings. *United States v. Idaho*, 298 U. S. 105 (1936); *Chicago, M. St. P. & P. R. Co.* v. *Chicago & E. I. R. Co.*, 198 F. 2d 8 (C. A. 7, 1952).

The length of the proposed construction—4.04 miles—is not such as to give it the nature of a branch line. Most of it is necessitated by appellants being blocked off by Southern's yard. In other cases tracks greater in length were held to be spurs. *United States* v. *Idaho, supra* (9 miles); *Jefferson County* v. *Louisville & N. R. Co.*, 245 S. W. 2d 611 (Ky., 1952), (5.75 miles).

The trackage will be used only for switching service incidental to line-haul movement a characteristic of spurs and industrial lead tracks. *Detroit & M. Ry. Co.* v. *Boyne City, G. & A. R. Co.*, 286 Fed. 540 (D. C., E. D. Mich., 1923); *Pennsylvania Railroad Co.* v. *Reading Company*, 132 F. Supp. 616 (D. C., E. D. Pa., 1955), affirmed, 226 F. 2d 958 (C. A. 3, 1955).

The cost of the project is reasonable in the light of traffic available (Ret. to Ques., Ex. E; Supplemental Ret. to Ques., pp. 5-7) and the track was requested by the shippers to give them needed service. *United States* v. *Idaho, supra; Chicago, M. St. P. & P. R. Co.* v. *Chicago & E. I. R. Co., supra; Pennsylvania Railroad Co.* v. *Reading Company, supra.*

The trackage will provide the supporting shippers with the same service as that accorded other industries similarly situated in the Chattanooga switching district. *Texas & Pac. Ry.* v. *Gulf, etc. Ry., supra; Chicago, Milwaukee, St. P. & P. R. Co.* v. *Northern Pac. R. Co.*, 120 F. Supp. 710 (D. C. W. D. Wash., 1954); *Pennsylvania Railroad Co.* v. *Reading Company, supra.*

While the proposed trackage would connect with four industries, the number involved apparently is of no significance. Cases holding trackage designed to serve several industries to be mere spurs or industrial leads are *Missouri, K. & T. R. Co.* v. *Texas & N. O. R. Co., supra; Chicago, M. St. P. & P. R. Co.* v. *Chicago & E. I. R. Co., supra.*

It is to be constructed to improve service to the shippers now being served by appellants through team track delivery and reciprocal switching. *Texas & Pac. Ry.* v. *Gulf, etc. Ry., supra.*

It will not provide a new route for transportation in interstate commerce. *Illinois Term. R. Co. Construction*, 290 I. C. C. 342 (1954); *Chicago, B. & Q. R. Co. Operation*, 282 I. C. C. 249 (1951); *Construction of Line by D. L. & W. R. R.*, 94 I. C. C. 541 (1925).

Judged by all of these considerations which have served as guides in the determination of the question involved, appellants' new trackage would be a spur or industrial track, just as Southern regards its tracks in the Boyce area, used for precisely the same purpose (Tr. 280-281). The latter were constructed without certificates of public convenience and necessity although

portions were completed as late as 1954 and 1955 (Exhibit H-9).

The track, being a mere spur or industrial lead, the Commission was without jurisdiction to pass upon the wisdom of the construction or its effect upon the public interest and, in accordance with *Powell v. United States*, 300 U. S. 276, 287 (1937), should have dismissed the application on that ground.

3. The Commission's Finding That the Proposal Would Be Inimical to the Public Interest and the District Court's Interpretation of That Finding Are Unsupported by and Contrary to the Evidence.

The record shows that there would be no diversion of traffic from Southern (Tr. 134, 151, 152); that the necessary expenditure for the construction would be reasonable in the light of available and prospective traffic (Ret. to Ques., Ex. E; Supplemental Ret. to Ques., pp. 5-7); that the construction would attract and encourage new industries to locate in the Boyce area—the only section of Chattanooga left open to heavy industrial development (Tr. 186, 190, 195); that it would provide a larger car supply, more direct routes to many destinations, and protection against breaks in continuity of service resulting from natural causes and strikes (Tr. 147-154). Yet, the Commission found that the construction "would be inimical to the public interest" (Appendix B-25). And the court interpreted this finding to mean that it would "jeopardize the stability of earnings of one or the other roads, make unlikely an

adequate return for one or the other on its investment or create such competition as would injure one of the two roads, and the harmful effect of such condition would 'be inimical to the public interest' " (Appendix A-10).

There are no facts in the record sustaining such a finding by the Commission or the interpretation thereof by the court. On the contrary, the only evidence as to these matters contradicts them. Being bare conclusions, unsupported by findings based upon facts of record, they must be held arbitrary and therefore erroneous.

4. Jurisdiction of the Commission Must Be Decided by the Court, Unhampered by Findings of the Commission, the Scope of Judicial Inquiry Into This Matter Being Unrestricted.

The district court stated: "The basic facts on which the jurisdictional question must be resolved are not in dispute. They are supported by substantial evidence and are therefore not subject to review by this court" (Appendix A-3).

Limitations, self-imposed by the courts, have been placed upon the scope of judicial review of administrative action in matters involving exercise of discretion committed by Congress to the Commission, a body possessing peculiar competence to deal therewith. This is not true of questions relating to the Commission's jurisdiction because jurisdiction is not a matter of discretion but rather one for judicial determination. The

distinction between the two kinds of questions is clearly drawn and explained at length in *Gt. No. Ry.* v. *Merchants Elev. Co.*, 259 U. S. 285 (1922).

Unquestionably, findings and conclusions of the Commission in matters involving the exercise of administrative discretion and expertise, supported by evidence reflected by the entire record and which are not unreasonable, arbitrary or capricious, are entitled to the great weight and respect which are accorded them upon judicial review. But whether the Commission has jurisdiction of the subject matter itself must be decided by a court based upon its own consideration of the facts bearing upon that issue. None of the cases dealing with this subject, known to appellants, suggests, much less holds, that a court is confined in any degree by findings and conclusions of the Commission as to its powers.

In this case jurisdiction rests upon whether appellants' proposed track would be an extension of line of railroad. The same question has frequently been decided by various courts without prior determination by the Commission. But the district court held that it could not review the facts relating to jurisdiction. It followed the argument of the appellees which was, in effect, that the court should emit a mere judicial echo of the administrative conclusion and in so doing it abdicated a judicial function.

Implicit in the cases dealing with the Commission's authority over track construction is a denial of any limitation on the scope of judicial review on that issue.

In *United States* v. *Idaho,* 298 U. S. 105 (1936), this Court held that taking of additional evidence on that question in the district court was not improper, saying, "whether certain trackage is a spur is a mixed question of fact and law *left by Congress to the decision of a court*—not to the final determination of either the federal or state commission" (p. 109). This statement was repeated in *Powell* v. *United States,* 300 U. S. 276 (1937), wherein it was said, "The decision of that question is for the court." In *Yonkers* v. *United States,* 320 U. S. 685 (1944), the Court cited these cases but held that the question should first have been considered by the Commission. It did not say, however, that upon review the court would in any way be inhibited by such prior action by the Commission. And in a dissent, not affecting this issue, it was repeated that such a determination by the Commission "does not foreclose an *independent* judicial judgment" (p. 693).

Where Congress has placed limits on the Commission's statutory powers it is the duty of the court on judicial review to determine those limits. *East Texas Lines* v. *Frozen Food Exp.,* 351 U. S. 49, 54 (1956). No agency may finally decide for itself the limits of its statutory power because that is a judicial function. *Social Security Board* v. *Nierotko,* 327 U. S. 358, 369 (1946). It follows that, if determination of the jurisdiction of the Commission is a judicial function and preliminary administrative conclusions on that issue are subject to independent judicial review, then that review necessarily must extend to an inquiry into all the facts as well as to an appraisal of the findings and

conclusions of the Commission. The holding of the district court that the facts bearing upon the jurisdictional question were not subject to its review is fundamentally erroneous.

CONCLUSION.

Appellants submit that the decision of the district court misapprehends the meaning and intention of the decision and rule in the *Texas & Pacific* case; that it misapplies the law as declared by this Court; and that the district court erroneously restricted the judicial function in its review of the action of the Commission herein, perpetuating unsupported findings of fact and erroneous conclusions of law made by that body in the first instance.

The questions involved are substantial in that they affect the right not only of appellants, but of all railroads, to provide necessary facilities to fulfill their duty to the public as common carriers. Upon these questions may depend the necessity for improvident anticipatory spur track construction by any railroad seeking to preserve its right to serve prospective industry along its right-of-way wherever proximity of another carrier threatens to deprive it of that right under the *Texas & Pacific* doctrine. Indiscriminate application of that doctrine would prohibit carriers from providing the shipping public with recognized advantages of competitive railroad services. Further, it is believed the extent of the Commission's authority over railroad track construction and the scope of

judicial review of administrative self-determination of that authority should be made more certain.

Respectfully submitted,

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PROOF OF SERVICE.

I, E. R. Leigh, one of the attorneys for appellants herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on the 7th day of February, 1958, I served copies of the foregoing Jurisdictional Statement on the several parties hereto, as follows:

1. On the United States, by mailing a copy in a duly addressed envelope, with air mail postage prepaid, to—

The Solicitor General
Department of Justice
Washington 25, D. C.

Victor R. Hanson, Esq.
Assistant Attorney General
Antitrust Division
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Washington 25, D. C.

Maurice A. Fitzgerald, Esq.
Attorney
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Washington 25, D. C.

2. On the Interstate Commerce Commission, by mailing a copy, in a duly addressed envelope, with air mail postage prepaid, to—

Robert W. Ginnane, Esq.
General Counsel
Interstate Commerce Commission
Washington 25, D. C.

Samuel R. Howell, Esq.
Associate General Counsel
Interstate Commerce Commission
Washington 25, D. C.

3. On Southern Railway Company, the Cincinnati, New Orleans & Texas Pacific Railway Company and Georgia Industrial Realty Company, intervening defendants, by mailing copies in duly addressed envelopes, with first class postage prepaid, to their respective attorneys of record, as follows—

Henry L. Walker, Esq.
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E. R. LEIGH

APPENDIX A

Opinion and Decision
Of the United States District Court,
Northern District of Georgia, Atlanta Division

in

State of Georgia, *et al.*, v. United States of America, *et al.*,
156 F. Supp. 711
(Decided October 21, 1957)

APPENDIX A.

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF GEORGIA,
ATLANTA DIVISION.

Civil Action No. 6063.

STATE OF GEORGIA,
WESTERN & ATLANTIC RAILROAD and
THE NASHVILLE, CHATTANOOGA & ST. LOUIS
RAILWAY, - - - - - - - - - *Plaintiffs,*

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION, - - - *Defendants.*

This is a suit under Sections 1336, 1398, 2284 and 2321-2325, inclusive, Title 28 U.S.C.A., to set aside, suspend, annul and permanently enjoin the orders of the Interstate Commerce Commission, hereinafter referred to as the Commission, dated September 4, 1956, and February 12, 1957, in a proceeding entitled Nashville, Chattanooga & St. Louis Railway, et al., Construction, Finance Docket No. 18942, reported at 295 I. C. C. 363. The order of September 4, 1956, was accompanied by a report of the same date. The report and orders constitute the action of the Commission, the validity of which is challenged by this suit, and should be read and construed together. (Georgia Commission v. United States, 283 U. S. 765, 771.) Louisville & Nashville Railroad Company was substituted as plaintiff for the Nashville, Chattanooga & St. Louis Railway. The Southern Railway System and the Cincinnati, New Orleans and Texas Pacific Railway Company intervened on the side of the defendants.

The suit raises two questions. The first is whether the proposed new trackage sought to be built by plaintiffs in

the vicinity of Boyce, Tennessee constitutes an "extension of its line of railroad" which would thus give the Interstate Commerce Commission jurisdiction over the matter, and, if so, the second is whether the Commission's refusal to grant a certificate that the present or future public convenience and necessity requir or will require the construction of the trackage should be reversed.[1]

The answer to the first question is required by reason of the contention of the plaintiffs that the proposed trackage is not an "extension" under the terms of the Interstate Commerce Act but is rather "an industrial track" to be wholly constructed within a single state and thus is within the exemption provided in Section 1 (22).[2]

---

[1] 49 U. S. C. A. §1(18) provides:

"(18) After ninety days after this paragraph takes effect no carrier by railroad subject to this part shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this part over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this part shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment. Nothing in this paragraph or in section 5 shall be considered to prohibit the making of contracts between carriers by railroad subject to this part, without the approval of the Commission, for the joint ownership or joint use of spur, industrial, team, switching, or side tracks."

[2] 49 U. S. C. A. §1(22) provides:

"The authority of the Commission conferred by paragraphs (18) to (21), both inclusive, shall not extend to the construction . . . of spur, industrial, team, switching or side tracks, located or to be located wholly within one State . . ."

The basic facts on which the jurisdictional question must be resolved are not in dispute. They are supported by substantial evidence and are therefore not subject to review by this Court. Without our determining precisely what standard is to be applied by us as to the power of a court to set aside determinations of the Interstate Commerce Commission involving mixed questions of law and fact (cf. Gray v. Powell, 314 U. S. 402), we are faced with the necessity of determining whether under any theory of review the court should set aside the Commission's determination that it had jurisdiction over the subject matter by reason of its decision that the proposed new trackage constituted an "extension of the line" of the plaintiff railroad.

The facts, which may be found more fully developed in the order of the Commission cited above, are briefly as follows:

The area or territory here involved is a triangular tract of land whose base is formed by the mainline tracks of plaintiffs, hereinafter usually referred to as the L & N, and a Southern Railway System subsidiary, Cincinnati, New Orleans and Texas Pacific Railway Company (hereinafter called the Southern), just on the edge of the city limits of Chattanooga, Tennessee. The two sides of the triangle are formed by the Chickamauga Creek on the right or the northeast side, and the Tennessee River on the left or southwest side. The tract is approximately 2½ miles wide at the base and approximately 1½ miles across from the base to the apex. The tracks of the plaintiffs were constructed in the middle of the last century and those of the Southern were, by permission, constructed on the plaintiffs' right-of-way at a later date. The later tracks are to the north of those of the plaintiffs and thus physically stand between the plaintiffs' line and the triangular area. Many years ago the Southern extended a switching or industrial track along

the right or northeast side of the triangle to serve several small industries in the area. This is called the "river track." It also, in 1952, built a switch or industrial track along the left or southwest side of the triangle for a short distance to serve a new industry, the Quaker Oats Company. This track extends not from the main line of the Southern but from its switching yard, which at the western end of the base of the triangle effectively blocks access from the plaintiffs' tracks to this area. For some 35 years prior to June 1954 this entire territory, known as the Boyce area, was in the Chattanooga switching district under reciprocal switching arrangements to which the plaintiffs and the Southern were parties. The Southern handled all cars of the L & N to all industrial side tracks in the area for a flat switching charge. This charge was absorbed by the L & N and was not added to the freight charges paid by shippers, who had the benefit of the Chattanooga tariffs.

The construction of river improvements on the Tennessee River gave new and added value to the Boyce tract for industrial sites. Permanent relief from overflow of the area came subsequent to 1939. The construction of Quaker Oats Company signalized the first major recognition of this new factor. Three other industries which the plaintiffs' proposed new trackage is designed to serve are located or are to be located on the Southern's river track previously mentioned, which is at the opposite end of the area. These are all potentially substantial users of rail transportation. The L & N has at all times maintained a team track in the vicinity of Boyce at which it has served such shippers as could advantageously use such facilities. The maximum annual car loadings prior to the advent of the Quaker Oats Company from the entire area were negligible. The anticipated car loadings from the presently existing and projected industries are very substantial. Estimates of gross freight revenues anticipated by the plaintiffs from all the industries

ncrease from $685,867 for the first year, to $1,072,906 the ifth year of operation. The estimated cost of the new rackage is $523,916.00.

In June 1954 the Southern issued new proposed tariffs vhich removed the northeasterly portion of the Boyce area, ncluding all of the new industries except the Quaker Oats Company from the Chattanooga switching district. This nabled the Southern to receive in lieu of the prevailing switching charge a substantially higher charge for the service, which the Commission found to be about 20% of the otal revenues on line-haul traffic moved by the L & N between their yards in Chattanooga and points throughout he country. This arrangement by the Southern was challenged by a complaint filed with the Commission by the Central of Georgia Railway and others.[3]

The matters involved in that complaint were determined by the commission in its report and order dated May 4, 1956. The effect of the Commission's order was to require the reestablishment of reciprocal switching in the Boyce area effective August 27, 1956. This order of the Commission was attacked by the Southern Railway System which filed suit in the United States District Court for the Eastern District of Virginia. That Court has recently dismissed hat suit and declined to interfere with the order of the Commission. Southern has announced its intention to appeal his judgment in order, if possible, to prevent the reestabishment of reciprocal switching arrangement in the Boyce rea.

The proposed new trackage would leave the main line f the L. & N at a point south of the eastern side of the riangular territory, proceed northerly and cross by an

[3]I. C. C. Docket No. 31737, Cramet Inc. v. Alabama Great outhern Railroad Company, et al., consolidated with I. C. C. No. 1677; Central of Georgia Railway v. Cincinnati, New Orleans & Texas Pacific Railway, and I. & S. No. 6284, Rutile Ore—Gulf and outh Atlantic Ports, heard on June 7, 1955.

overhead bridge the main line of the Southern. It would parallel the Southern river track where it serves the three industries along the Chickamauga Creek and then turn southwesterly across the untapped midsection of the territory for approximately two miles to the plant of Quaker Oats Company.

After plaintiffs filed their application with the Commission for the certificate of public convenience and necessity, they filed a motion to dismiss based on their contention that such certificate was not required under the statute because, so they contended, the proposed trackage was an industrial track rather than an extension of line. The Commission held hearings on the motion as well as on the merits. It entered its order finding that the proposed trackage was an "extension" as contemplated in Section 18 of the statute, and that thus the Commission had jurisdiction in the matter. It also found that the present and future public convenience and necessity were not shown to require the construction.

There is an authoritative guide to aid the Commission and the courts in determining whether additional trackage is an "extension" of the line of the carrier or is a "spur, industrial, team, switching or side track(s)." After discussing the congressional policy expressed in the Transportation Act the Supreme Court said in Texas & Pacific Rwy. Co. v. Gulf C. & S. F. Rwy. Co., 270 U. S. 266:

> "If the purpose and effect of the new trackage is to extend substantially the line of a carrier into new territory, the proposed trackage constitutes an extension of the railroad, within the meaning of paragraph 18, although the line be short and although the character of the service contemplated be that commonly rendered to industries by means of spurs or industrial tracks."

Thus we find the critical words are "substantially" and "new territory." The first is of course an indefinite word, but it is one whose meaning can be made more definite by reference to the other language in the opinion. "New territory" is also an indefinite expression when applied to a situation where, as here, the applicant carrier's tracks actually impinge upon but do not penetrate the area involved. This term, too, is made more meaningful by other language of the court's opinion.

In the Texas Pacific case, the Santa Fe commenced constructing new trackage of approximately 7½ miles from a junction on the opposite side of the city of Dallas, Texas, from an industrial area already served by main line and industrial tracks of the Texas Pacific; by air line the nearest tracks of the Santa Fe were some 3½ miles from the area. It was clear that the purpose of this new construction was to tap the rich industrial area and not to serve existing industries along the new line. The cost of the proposed trackage was some half million dollars, certainly quite a substantial sum in 1925. The Texas Pacific sought to enjoin the construction because the Santa Fe had not obtained the certificate from the Commission. The latter road defended on the ground that this was an "industrial track" and not an "extension" of its line. Notwithstanding there was an absence of many of the characteristics of an extension, e.g., express and passenger service, ticket and freight agents, telegraph service, the creation of new routes, and notwithstanding there were present some characteristics of industrial tracks, e.g., an unballasted road, light weight rails, service on a switching basis rather than for additional charge to the shipper from the junction point and the handling exclusively of car load freight, nevertheless the trial court held that this was an extension. The Court of Appeals reversed and the Supreme Court granted certiorari. In its opinion the court first laid down a rule of

construction of the same words with which we are here concerned. Since, in our view of the matter they control our decision in this case, we quote fully the statement and also the reasoning and conclusion reached by the court:

"In support of its contention that the proposed line constitutes an industrial track, the Santa Fe cites instructions differentiating branches from spurs, which are given by the Interstate Commerce Commission in forms long prescribed for accounting purposes. It points also to uses made of these terms in other connections by courts, by the Commission, and by state legislatures. A truer guide to the meaning of the terms extension and industrial track, as used in paragraphs 18 to 22, is furnished by the context and by the relation of the specific provisions here in question to the railroad policy introduced by Transportation Act, 1920. By that measure, Congress undertook to develop and maintain, for the people of the United States, an adequate railway system. It recognized that preservation of the earning capacity, and conservation of the financial resources, of individual carriers is a matter of national concern; that the property employed must be permitted to earn a reasonable return; that the building of unnecessary lines involves a waste of resources and that the burden of this waste may fall upon the public; that competition between carriers may result in harm to the public as well as in benefit; and that when a railroad inflicts injury upon its rival, it may be the public which ultimately bears the loss. See Railroad Commission v. Chicago, Burlington & Quincy R. R. Co., 257 U. S. 563; The New England Divisions Case, 261 U. S. 184; The Chicago Junction Case, 264 U. S. 258; Railroad Commission v. Southern Pacific Co., 264 U. S. 331. The Act sought, among other things, to avert such losses.

"When the clauses in paragraphs 18 to 22 are read in the light of this congressional policy, the meaning and scope of the terms extension and industrial track become clear. The carrier was authorized by Congress

to construct, without authority from the Commission, 'spur, industrial, team, switching or side tracks . . . to be located wholly within one State.' Tracks of that character are commonly constructed either to improve the facilities required by shippers already served by the carrier or to supply the facilities to others, who being within the same territory and similarly situated are entitled to like service from the carrier. The question whether the construction should be allowed or compelled depends largely upon local conditions which the state regulating body is peculiarly fitted to appreciate. Moreover, the expenditure involved is ordinarily small. But where the proposed trackage extends into territory not theretofore served by the carrier, and particularly where it extends into territory already served by another carrier, its purpose and effect are, under the new policy of Congress, of national concern. For invasion through new construction of territory adequately served by another carrier, like the establishment of excessively low rates in order to secure traffic enjoyed by another, may be inimical to the national interest. If the purpose and effect of the new trackage is to extend substantially the line of a carrier into new territory, the proposed trackage constitutes an extension of the railroad within the meaning of paragraph 18, although the line be short and although the character of the service contemplated be that commonly rendered to industries by means of spurs or industrial tracks. . . . ."

Texas & Pac. Rwy. v. Gulf, etc., Ry., 270 U. S. 266, 277, 278.

Thus we find that though the court finally made the test the *substantial* extension into *new territory*, much meaning was given to these words by the court's statement of the purpose of the statute. We think it clear that if the proposed construction offers a substantial threat to a "preservation of the earning capacity, and conservation of the financial resources" of either the proponent of the new

trackage or of the existing carrier it may become "a matter of national concern"; if there is a substantial doubt that "the property employed" (and this must mean the property employed by both the new and the old carriers) will "earn a reasonable return," or that it constitutes an unneeded duplication and that 'the building of unnecessary (i.e., duplicating) lines involves a waste of resources" whose burden "may fall upon the public"; and if the type of competition that would result "may result in harm to the public as well as in benefit," or that the injury to its rival may cause the public ultimately to bear the loss then the Act sought, among other things, to avert such results. This is the clear teaching of the Texas Pacific case.

In its conclusions and findings the Commission said:

> "Measured by the standard of service ordinarily performed by railroads throughout the country, we believe that the record supports a conclusion that the service accorded by the Southern to the industries in the Boyce area is adequate to meet all the reasonable traffic demands of those industries and, under that circumstance, the proposed extension, costing over one-half million dollars, would be an expenditure of money not in furtherance of the national transportation policy, and would be inimical to the public interest."

This, it seems to us, is a finding of the following facts:

1. Present service is ample for both shippers and the public.

2. The proposed construction would be a duplication of facilities.

3. Such duplication would be an unnecessary expenditure of substantial size not in furtherance of the national transportation policy because it would either jeopardize the stability of earnings of one or the other roads, make unlikely an adequate return for one or the

other on its investment or create such competition as would injure one of the two roads, and the harmful effect of such condition would "be inimical to the public interest."

We think that when such facts are found by the Commission based on substantial evidence on the record as a whole[4] we may not set them aside. It is clear here that these findings are supported by the evidence. Although these findings were made by the Commission in connection with the merits of the application for certificate of convenience and necessity they stand in the record for whatever purpose they may serve on the jurisdictional question as well. We are unable to avoid the conclusion that findings that the proposed expenditures would merely duplicate present facilities and that such unnecessary duplication would be inimical to the public interest has a bearing on our determination of what is a substantial extension into new territory. It is *new territory* to the L & N because the L & N is not now serving it in the sense in which the court used the word "serve" in the Texas and Pacific case or in the sense in which the Southern is now serving it. It is a *substantial* extension because it involves substantial expenditures and runs a substantial distance. We think that the building of new tracks of significant mileage comes within the jurisdiction of the Commission when it involves a substantial expenditure of funds to duplicate existing adequate facilities to tap an area of industrial potential which it cannot now serve from its own facilities if such expenditure or the competition resulting therefrom might be a burden on the public. This is such a case.

The L & N argues that this territory cannot be new to it because it has always held itself out to serve the area

[4] 5 U. S. C. A. §1009(e). Universal Camera Corp. v. N. L. R. B., 340 U. S. 474

both by the presence of its main line, and the team track (which is all that was needed for a century) and because of the reciprocal switching arrangement between it and the Southern. The fact remains that the L & N does not consider this service adequate; otherwise it would accept the status quo and not now seek to spend a half million dollars to push its track into the area. Moreover plaintiffs do not take the position that the mere existence of a reciprocal switching agreement constitutes such service as would prevent any area covered thereby from becoming a new territory as to a connecting carrier. Since the reciprocal switching agreement does in the broadest sense of the term result in the L & N "serving" all the industries that are on the Southern's industrial track within the switching area, this is an implied admission that the term "serve" in Texas & Pacific means something more than the type of service that is here furnished by it.[5]

We deduce from the facts in the Texas & Pacific case that the use of the word "served" there comprehended serving by means of its own substantial facilities which would be expensive to duplicate. In that sense the L & N cannot claim that it is now "serving" the territory and hence it is not new to it.

Our attention is called by the plaintiffs to the decision by the Court of Appeals for the Fifth Circuit in Missouri K.&T.R. Co. v. Texas & N.O. R.R. Co. (5 Cir.), 172 F. 2d 768, and Pennsylvania Railroad v. Reading Co., 132 F. Supp. 616, aff'd. (3 Cir.), 226 F. 2d 958. The Court held in the first of these cases that new trackage costing only $30,000 to $40,000 extending approximately a mile into an industrial area as to which both roads had been in steadily extending

[5]We think it appropriate to assume in this discussion that the reciprocal switching agreement is still in force, for undoubtedly the Commission assumed this during the proceedings before it. The Commission's action requiring its continuance now stands unreversed, although on appeal in court.

competition through the construction of switch and industrial tracks, was not an "extension" within the Act. In the Reading case the Court held that where both roads had for years parallel lines on opposite sides of the Schuykill River and both repeatedly crossed the river to reach industrial sites, the building of a track and bridge 1700 feet long across the river to reach a single power plant to furnish it a type of service it could not then get from the other road was only an industrial track or spur even though it would cost a very substantial sum.

We have considered these and the other cases cited by the plaintiffs in support of their contentions that we should determine on the record that this is not an extension of the line of the L & N. In light of the finding of the Commission of the basic facts set out above we do not believe that this case is controlled by any of them. We conclude therefore that the Commission had jurisdiction.

What has already been said also requires us to deny the relief sought by the plaintiffs on the merits. The granting or denial of such a certificate is a power given to the Interstate Commerce Commission, and if on substantial evidence the Commission makes its determination that the present and future public convenience and necessity do not require the proposed service the courts do not reverse in the absence of legal error contributing to the Commission's decision. Here we find that the basic facts heretofore outlined are sustained by the record and no legal error appearing the decision of the Commission must stand.

We have heretofore adverted to the present status of the reciprocal switching agreement whereby the L & N in practical effect obtains much of the advantage it would have from building its own facilities into this area. The court considers the status of this agreement quite relevant to the merits of this controversy. We think it well within the realm of the possible that in the absence of a subsisting

reciprocal switching agreement by the terms of which the L & N can compete on substantially even terms with the Southern on shipments into and out of the area in question the Commission would have given favorable consideration to the application of the plaintiffs for permission to build their own tracks. In commenting on this the Commission said:

> "Witnesses for the industries in the Boyce area have not seriously disputed the adequacy of the Southern's service, and their testimony indicates that they want another line of railroad primarily for bargaining purposes. The industries served by the Southern's river track support the application almost entirely for the reason that they are not accorded reciprocal switching. Practically all of their existing difficulties, including adequate transit privileges, will be satisfied if they are accorded reciprocal switching, and that matter is before the Commission and will be determined in an appropriate proceeding."

It has now been determined by the Commission that the reciprocal switching arrangement must be continued and, thus, in the view of the Commission, most of the need for the L & N's service would be satisfied so far as the industries are concerned. Alternatively, if the Supreme Court should reverse the Commission's order restoring reciprocal switching, then quite a different situation would exist from the standpoint of both shippers and competing carriers.

We therefore deny the relief here sought by plaintiffs only in the present state of the records in the two cases. This denial is not conditional, but it is without prejudice to the right of the plaintiffs to present anew their application to the Commission for certificate authorizing them to build the proposed extension in the event that the reciprocal switching agreement now ordered in effect by I. C. C. Docket No. 31737 is later terminated either by the court or by action of the Commission itself.

The prayers of the complaint are DENIED and the complaint is DISMISSED.

This 21st day of October, 1957.

Elbert P. Tuttle,
United States Circuit Judge.

Frank A. Hooper,
United States District Judge.

Boyd Sloan,
United States District Judge.

Filed in Clerk's Office
Oct 21 1957

C. B. Meadows, Clerk
By RD
Deputy Clerk

APPENDIX B

Report of
Interstate Commerce Commission
in Finance Docket No. 18942

Nashville, Chattanooga & St. Louis Railway,
et al., Construction
295 I.C.C. 363
(Decided September 4, 1956)

APPENDIX B.

[295 I.C.C. 363] **[363]**

INTERSTATE COMMERCE COMMISSION

FINANCE DOCKET NO. 18942

NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY ET AL. CONSTRUCTION

Decided September 4, 1956

1. Motion to dismiss the application for want of jurisdiction, overruled.
2. Present and future public convenience and necessity not shown to require construction and operation by the Nashville, Chattanooga & St. Louis Railway and the Western & Atlantic Railroad of a line of railroad in Hamilton County, Tenn.

E. R. Leigh, William A. Miller, W. D. Spears, and *Prime F. Osborn* for applicants.

E. Freeman Leverett and *Robert W. Burchmore* for interveners in support of the application.

Sidney S. Alderman, James A. Bistline, and *Phil B. Whitaker* for interveners in opposition to the application.

REPORT OF THE COMMISSION

DIVISION 4, COMMISSIONERS MITCHELL, WINCHELL, AND HUTCHINSON

BY DIVISION 4:

Exceptions to the report proposed by the examiner were filed by the applicant and the interveners favoring the proposal. Briefs were filed and the case has been argued orally.

The Nashville, Chattanooga & St. Louis Railway and the Western & Atlantic Railroad, on May 27, 1955, filed a

joint application under section 1 (18) of the Interstate Commerce Act, as amended, in which authority was sought to construct and operate a line of railroad, extending in a general southwesterly direction from a point on the main line of the latter, at milepost 130.35, near the village of Boyce, to the plant site of the Quaker Oats Company, approximately 4.04 miles, in Hamilton County, Tenn. The State of Georgia and an industry known as Cramet, Inc., intervened in support of the application. The Southern Railway Company and two of its subsidiaries, The Cincinnati, New Orleans and Texas Pacific Railway Company and the Georgia Industrial Realty Company, intervened in opposition to the application. All points mentioned herein are in the State of Tennessee unless otherwise designated. As hereinafter sometimes used, the term "applicant" will have reference to the Nashville, Chattanooga & St. Louis Railway, and the term "Southern" will be used [364] synonymously with the Cincinnati, New Orleans & Texas Pacific Railway Company.

On September 15, 1955, the applicant filed a motion to dismiss the application on the ground that the line proposed to be constructed would be a spur, industrial, or switch track, falling within the exemption provided in section 1 (22) of the act. The Southern filed a reply thereto. By order dated September 23, 1955, consideration of the motion was deferred pending full hearing on all the facts relating to the application. A hearing was held at Chattanooga on October 3, 4, and 5, 1955.

General Description of Applicant's Lines.

The Nashville, Chattanooga & St. Louis Railway is a subsidiary of the Louisville & Nashville Railroad Company which, in turn, is controlled by the Atlantic Coast Line Railroad Company. It operates approximately 1,043 miles of railroad as a component part of the Coast Line system.

Its railroad consists of a main line, extending easterly from Memphis, through Nashville and Chattanooga, to Atlanta, Ga., and various branch lines, one of which extends to Paducah, Ky., and Ohio River crossings in the northwest, and another to Gadsden, Ala. Connections for interchange of traffic are made with the Southern at Chattanooga. It has numerous connections with other carriers in the territory served by it, including the Illinois Central Railroad Company, to the west. An application is pending with us, filed in Finance Docket No. 18845, in which authority is sought to merge the properties of the applicant into those of the Louisville & Nashville Railroad Company.

Western & Atlantic Railroad

The Western & Atlantic Railroad was constructed many years ago by the State of Georgia, and its properties are still owned by that State. Its line of railroad extends southerly from Chattanooga to Atlanta, Ga., 136 miles, and the care of its railroad properties is exercised by the Georgia Public Service Commission, pursuant to acts of the General Assembly of the State. Its railroad has been operated under lease by the applicant since 1890 and constitutes the applicant's main line between the above-named points. The present lease will expire by limitation in 1969. The portion of the right-of-way of the Western & Atlantic Railroad extending from Boyce southwesterly to Chattanooga, approximately 5.5 miles, is jointly occupied by parallel lines of the applicant and the Southern. Years ago, the State of Georgia granted the Cincinnati Southern Railway easement rights to construct a portion of its line on that section of the right-of-way. The properties of the latter are owned by the city of Cincinnati, but they are leased to and operated by the Southern.

[365] PURPOSE OF PROPOSED LINE AND DESCRIPTION OF TERRITORY

The village of Boyce is just outside the northeasterly limits of the city of Chattanooga. The point of connection between the applicant's proposed line and its main line is in the vicinity of Boyce, about 2,000 feet beyond the northeasterly boundary line of the city and about 5.5 miles from the applicant's freight station in the city. The Southern and the applicant once maintained a joint agency station at Boyce, but the latter discontinued the use of it many years ago. The purpose of the applicant's proposed line is to reach new industries located or to be located in a territory referred to as the Boyce industrial area, or Boyce area. As delineated on maps submitted in evidence, the boundary lines of this area resemble the sides of an obtuse triangle, the base of which is formed by the parallel main lines of the applicant and the Southern, previously described, for a distance of about 2.5 miles. The northeasterly side is bounded by the Chickamauga Creek and the southwesterly side by the Tennessee River. The vertex of this triangle is about 1.3 miles north of Boyce, at the confluence of those streams. As above indicated, most of the area is within an outward bend of the river and formerly was subject to periodic overflow. However, that situation was overcome gradually through construction by the Tennessee Valley Authority of certain flood control dams on the Tennessee River. Permanent relief from overflow of the area came in 1939, when the so-called Chickamauga dam was completed. From time to time thereafter, the Southern, through its subsidiary, the Georgia Industrial Realty Company, purchased much of the land for industrial purposes. Since September 1952, it has acquired 765 acres at a total cost of $1,172,842.

Old Industries in the Area

Although much of the Boyce area was undesirable for the location of industries prior to the advent of flood control, it appears that for many years 4 or 5 small industries have been operating in the extreme northeasterly part of the area, in the vicinity of Chickamauga Creek. They are engaged in the manufacture of such products as wooden handles, heaters, fireplace fixtures, et cetera. Rail service to these industries is afforded by the Southern over a spur track which it built over 50 years ago. This spur, known as the river track, extends northwesterly from a connection with the Southern's main line, at or near Boyce station, to a point on the Tennessee River near the mouth of Chickamauga Creek, approximately 1.3 miles. The volume of traffic handled by the Southern for all such industries is comparatively small, and they have shown no interest in this proceeding.

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New Industries in the Area

Quaker Oats Company.—In the early part of 1952, the Quaker Oats Company completed the construction of a plant for the manufacture of cornmeal, hominy grits, corn oil, corn seed ingredients, et cetera, and for use as a distribution center to southeast territory, at a cost in excess of $1 million. A feed mill also is under construction for the manufacture of mixed animal and poultry feed. The plant is located in the extreme southwesterly part of the Boyce area and is served by the Southern through means of a spur track leading from its Citico yard, a distance of about 0.75 mile. This spur constitutes the plant's only rail outlet, but it has access to the Tennessee River. It is within the switching district of Chattanooga and has the services of all lines entering that city under reciprocal switching arrangements published in the tariffs of various carriers.

The volume of the plant's inbound and outbound traffic is not specifically shown, but the evidence is that 1,500 carloads of such traffic were routed via the applicant's lines in 1954, and that the total volume to be handled by both the applicant and the Southern would be approximately 5,000 carloads in 1955.

The other three industries which the applicant's proposed line is designed to serve are the Central Soya Company, Heavy Minerals, Inc., and Cramet, Inc. Their plants are located, or are to be located, on the Southern's river track, previously mentioned, which is at the opposite end of the area about 2 miles northeast of the plant of the Quaker Oats Company.

Central Soya Company.—The Central Soya Company is engaged in the manufacture of soybean meal and oil, crude lecithin, and mixed feeds for livestock and poultry. It is also engaged in merchandising grain. In addition to the rail outlet afforded by the Southern's river track, it is served by river barges. Construction of its plant, costing approximately $7 million, was commenced in June 1954 and, at the time of the hearing, was scheduled for completion in November 1955. Partial operation began early in 1955. According to estimates made by a witness for the company, the inbound rail traffic will consist of 70,000 tons of feed ingredients, 1,150 tons of bags, and 48 tank cars of hexane solvent, and the outbound rail traffic will consist of 67,500 tons of soybean meal and 1,000 tank cars of crude soybean oil annually. Most of the plant's transportation requirements will be met by means of transportation other than railroad. The witness estimates that 6 million bushels of grain, largely corn, and 6 million bushels of soybeans will be brought in by barge annually, and that 4 million bushels of grain will be shipped out by truck. About 95 percent of all the soybeans and grain processed at the plant is received by barge. The witness states, in effect, that it

would be as convenient to ship by truck as by rail and that if the Southern does not reduce its frieght [367] rates on the company's commodities to meet the cost of trucking, or reestablish reciprocal switching in the Boyce area, the latter will resort to the use of trucks for the movement of a substantial volume of its outbound traffic.

Cramet, Inc.—Cramet, Inc., a subsidiary of the Crane Company, of Chicago, Ill., is engaged in the manufacture of titanium sponge and ingots, and various chlorides. The plant, located on or near the Southern's river track, about midway between its termini cost more than $25 million, including Federal aid. Partial production began in January 1955. The entire finished products of the plant are required by the United States Government for aircraft production and other national defense uses. Its raw material inbound consists largely of rutile ore imported from other countries. About 80 percent of its finished products are shipped out by rail and the remainder by truck. The destinations are not shown for reasons of military secrecy. Under normal production, which the plant hopes to reach sometime soon, the annual volume of traffic is expected to be 56,510 tons inbound and 11,869 tons outbound.

Heavy Minerals Company.—Heavy Minerals Company, also a subsidiary of the Crane Company, and which is designed to process heavy minerals and chemicals, contemplates the construction of a plant on a tract of land adjoining that of Cramet, Inc. It is still in the planning stages. The estimated cost of construction is shown to be $5 million, including Federal aid. No further details of the proposed plant are shown of record because of military secrecy.

The Southern has constructed certain tracks and so-called turnouts to connect with the industrial tracks of the new industries at a total cost of $92,906.

Present Service to the Industries

All rail traffic moving to and from the industries in the Boyce area is handled through the Southern's Citico freight yard which is located in the extreme southwesterly end of the area, close to the plant of the Quaker Oats Company. This yard recently was remodeled and expanded by the Southern at a cost of about $15 million, and is one of the most modern freight yards in the United States. Normal operation of the yard is performed 7 days a week by 12 engine crews, 4 of which are engaged during each 8-hour shift. Additional crews are sometimes required. Switching service between the Citico yard and the industries in question is performed by means of engines from the Citico yard, operated by yard crews. Service to the plant of the Quaker Oats Company is performed 6 days a week, during the hours between midnight and 7 a. m. The company requested that the service be performed during those hours to avoid interference with plant operations during working hours between 7 a. m. and midnight.

[368] Switching service to the plant of the Central Soya Company, and other plants served by the Southern's river track, is performed by a yard-engine crew which delivers loaded and empty cars to the plants from the Citico yard and brings back loaded cars to that yard for outbound movement. Extra switching service is sometimes performed. The Southern stands ready to perform special switching service to any of the industries that request it.

Methods of Handling Interchange Traffic Between Yards

Outbound freight traffic from the industries in the Boyce area is interchanged between the Southern and the applicant at the latter's freight yard, known as the Craven yard, which is located in Chattanooga about 7.5 miles south

of the Southern's Citico yard. The Southern switches such traffic from its Citico yard to the applicant's Craven yard. Conversely, inbound traffic handled by the applicant for the industries is switching by the applicant from its Craven yard to the Southern's Citico yard. The Tennessee, Alabama & Georgia Railway Company and the Central of Georgia Railway Company also have interchange connections with the Southern at Chattanooga, and the traffic handled by those carriers for the industries is switched to and from the Citico yard in a similar manner. The Southern makes two deliveries a day to each of the above-named carriers. In turn, the applicant and the Central of Georgia Railway each makes 2 deliveries a day to the Southern, but the Tennessee, Alabama & Georgia Railway makes only 1 delivery.

Freight Train Service Afforded by the Southern to Chattanooga

Describing the main-line freight service performed by the Southern to and from Cattanooga, the general manager of the western lines of the Southern system testified substantially as follows:

> "The Southern system has an average of 7 freight trains daily, northbound out of Citico yard, in the direction of Cincinnati; 3 of these trains, when they reach Danville, Ky., go to Louisville and connections, and 2 of them go on beyond Louisville to St. Louis. There is an average of 4 or 5 freight trains a day that move out of Citico yard, directly to Cincinnati, and make connections there. The same service is performed in the reverse direction. There is an average of 4 freight trains a day in each direction between Chattanooga and Knoxville; an average of 4 freight trains a day between Chattanooga and Jacksonville, Fla., via Atlanta and Macon, Ga.; an average of 3 freight trains a day in each direction between Chatta-

nooga and New Orleans, La., via Birmingham, Ala.; and an average of 3 freight trains a day in each direction between Chattanooga and Memphis."

Location of Applicant's Proposed Line

As previously indicated, the applicant's main line passes along the southeastern boundary of the Boyce industrial area, and from [369] that point to Chattanooga, 5.5 miles, it parallels the main line of the Southern. The applicant cannot construct a railroad to reach the industries in question without crossing the main line of the Southern. In other words, the Southern has the "inside track" next to the industrial area. The proposed line would connect with the applicant's main line at milepost 130.35, a point about 2,000 feet northeast of the boundary line of the city of Chattanooga and would cross the main line of the Southern near that point by means of an overhead bridge. It would extend northwesterly from this bridge for a distance of about 1.75 miles, roughly paralleling the Southern's river track, to the plant facilities of the Central Soya Company, thence southwesterly, about 2 miles farther, to the plant facilities of the Quaker Oats Company. The applicant has instituted condemnation proceedings in court to acquire the necessary right-of-way, much of which is designed to traverse land specifically acquired by the Southern for the location of prospective industries. In addition to the main-line crossing, referred to above, the proposed line would cross the Southern's river track and certain spur or industrial tracks, at grade, within the Boyce industrial area. It would also cross certain highways.

Physical Characteristics of Proposed Line and Cost of Construction

The proposed line would be a single-track standard-gage railroad, laid with 90-pound rail. The maximum grade is to be 1.38 percent toward the main line and 1.70 percent in the

opposite direction, compensated for curvature. The average rate of curvature per mile would be 78° 45′. It is estimated by applicant that the charges to road account for maintenance would be about $6,250 a year for the first 5 years of operation. The applicant has submitted a statement showing estimated costs of the various items involved in the proposed construction. The total cost of construction would be $523,916. Construction would be commenced immediately upon our authorization and completed within 8 months. Funds are now available to meet such costs. The applicant would not require any additional equipment for operating purposes.

ESTIMATED VOLUME OF TRAFFIC AND REVENUES

Estimates of the volume of traffic which the applicant expects to acquire in event of the proposed construction were based upon information furnished to it by the industries. These estimates, for the year 1956, are as follows: [370]

Industry	Tons of freight	Gross freight revenues
Quaker Oats Company	43,111	$ 219,868
Central Soya Company	77,282	239,952
Cramet, Inc.	31,905	200,519
Heavy Minerals, Inc.	6,975	25,528

Estimates covering the combined freight traffic and revenues anticipated by the applicant from all the above-mentioned industries for each of the first 5 years of operation of the proposed line are shown as follows:

Period	Tons of freight	Gross freight revenues
Year 1956	159,273	$ 685,867
Year 1957	178,986	763,426
Year 1958	225,997	932,444
Year 1959	245,773	1,008,496
Year 1960	257,593	1,072,906

After deducting railway operating expenses, railway tax accruals, hire of equipment, and joint facility rents from the gross freight revenues, the applicant shows that the net railway operating income from operation of the proposed line would be $158,052 in 1956, $175,963 in 1957, $214,877 in 1958, $232,395 in 1959, and $247,260 in 1960.

Reciprocal Switching in the Boyce Area

For a period of at least 35 years prior to June 23, 1954, the Boyce area was included in the Chattanooga switching limits, and all railroads entering Chattanooga had access to the industries in that area through reciprocal switching arrangements with the Southern. The Southern performed all such switching, and charges therefor were absorbed by the participating carriers. The prevailing charge for switching to and from the plant of the Quaker Oats Company, which is the only industry that continues to have reciprocal switching privileges in that area, is at the rate of $12.73 per loaded car. Pursuant to tariff publication,[1] on the last-mentioned date, the industries served by the Southern's river track in the northeasterly portion of the Boyce area, including the Central Soya Company, Cramet, Inc., and Heavy Minerals, Inc., were removed by the Southern from the Chattanooga switching district. This action enabled the Southern to receive, in lieu of the prevailing switching charge, a division of about 20 percent of the total revenues on line-haul traffic moved by the applicant and participating carriers between their yards in Chattanooga and points [371] throughout the country. The applicant alleges that such a division is several times greater than the charge formerly collected by the Southern under the reciprocal switching arrangements. However, the removal of that portion of the Boyce area from the

[1] Cincinnati, New Orleans & Texas Pacific Ry., Terminal Tariff No. 489-H, Supp. 4, I. C. C. No. 4707.

Chattanooga switching districts resulted in no increased freight rates to the shippers. The difference between the former switching charge and the 20-percent division of line-haul revenue comes out of the pockets of the applicant and other participating carriers.

On brief, the applicant alleges that perhaps the most serious deficiency in the present railroad service at Boyce is the lack of reciprocal switching; that upon completion of the extension the entire area would be restored by the applicant to the Chattanooga switching district; and that the reestablishment of reciprocal switching would be equivalent to locating each of the industries in question on all railroads serving Chattanooga.

Soon after the reciprocal switching arrangements were canceled by the Southern, the Central of Georgia Railway, Cramet, Inc., and others filed a complaint with this Commission requesting the elimination of provisions in Southern's tariffs withdrawing the Boyce area from the Chattanoga switching district.[2] The matters involved in the complaints were determined by the Commission, division 2, in its report and order in *Rutile Ore. Gulf and South Atlantic Ports to Tennessee,* 298 I. C. C. 439. The effect of the Commission's order therein was to require the reestablishment of reciprocal switching in the Boyce area, effective August 10, 1956, subsequently postponed to August 27, 1956. Upon petition of the Southern for reconsideration and reargument, the Commission stayed the effective date pending disposition of the petition.

Although matters pertaining to reciprocal switching in the Boyce area are not at issue in this proceeding, they are

[2]Docket No. 31737, Cramet, Inc. v. Alabama Great Southern Railroad Company, et al., consolidated with I. C. C. No. 31677, Central of Georgia Railway Company v. Cincinnati, New Orleans & Texas Pacific Railway Company, and I. & S. No. 6284, Rutile Ore from Gulf and South Atlantic Ports to Tennessee, heard on June 7, 1955.

made the subject of considerable discussion of record and ordinarily would be factors to be considered as bearing on the need for the proposed line. However, in view of the fact that such issues are properly before the Commission in another proceeding, we need not accord them great weight here.

TESTIMONY ON BEHALF OF THE INDUSTRIES AND OTHERS

The general traffic manager of the Quaker Oats Company testified, among other things, that the present location of the company's plant in the Boyce area was selected largely because the site was accessible to the Tennessee River and the railroads of both the applicant and the [372] Southern. The record does not show whether transportation facilities by water are available at the present time. The plant has the services of all lines of railroad entering Chattanooga under reciprocal switching arrangements published in the tariffs of the various lines serving that city. The witness explains that the plant's rail-transportation business is predominantly transit; that it operates very largely on milling-in-transit rates; and that it enjoys milling-in-transit privileges on all the lines referred to above. He states that it has no rate difficulties; that the Southern always afforded good switching service to and from the plant; and that the service generally has been entirely adequate. His principal reasons for wanting the applicant's proposed lines are (1) to afford the plant an additional source of car supply, (2) to expedite service to some destinations by eliminating the loss of time consumed in switching under present conditions, and (3) to insure continuity of service in the event of strikes of the employees on one line or the other. In other words, if labor disturbances caused one of the lines to cease operation, the other would be available for use. He

believes that continued growth of the plant is, to some extent, dependent upon the service of two lines of railroad.

The witness admitted that the Southern had supplied the plant with plenty of cars for outbound shipments, but he complained that some of them had to be made suitable for loading at the expense of the Quaker Oats Company. Availability of the applicant's proposed line would cause no change in the present freight rates on commodities shipped to or from the plant. Under present switching arrangements, the plant is afforded an opportunity to route as much of its traffic over the applicant's line as it desires. The volume so routed was 1,500 carloads in 1954.

The vice president of the Central Soya Company stated that when the plant site was selected, the company was aware of its proximity to the applicant's main line, and he expected that it would be served by the applicant and all other lines reaching Chattanooga through reciprocal switching. Much of his testimony was devoted to alleged traffic disadvantages caused by the Southern's action in depriving the plant of reciprocal switching service. He stated that, in his opinion, a soybean and feed manufacturing plant could not exist without transit arrangements. He further stated that all the grain which the company merchandised since the plant commenced operation in April 1955 came in by river barges and moved out by trucks; that more than 3 million bushels of corn have moved out of the plant by truck since that time; that it would be as convenient to ship by truck as by rail; that the extent of the company's use of trucks in the future is entirely dependent upon "how realistic an attitude the carriers take in meeting our competition with our freight rates"; and that the [373] company would resort to the use of trucks if it considered the rail rates to be unreasonable.

The remaining industries designed to be served by the applicant's proposed line, hereinafter referred to as the

industry, are Cramet, Inc., and Heavy Minerals, Inc., which are now reached by the Southern's river track. As previously indicated, construction of the plant of Heavy Minerals, Inc., has not been started. The traffic manager of Crane Company, which controls the industry, testified that the industry is situated at a local point on the Southern Railway and is solely dependent upon that carrier for car-supply service, emergency switching, and rate publications; that the elimination of reciprocal switching made the industry a "captive" one; that it prevents the industry from routing traffic so as to enable it to take advantage of certain transit privileges; and that it forces the industry to use circuitous routes in many instances. The witness was asked concerning the financial benefit that would accrue to the industry if it had the service of the proposed line. He replied as follows:

> "That would be difficult to state, because we don't know what rates we are going to have to propose and, with a local point on a railroad, you don't have any assurance you are going to get the best rate from a competitive standpoint. Where there are two carriers, you are certainly going to get the consideration on a reasonable rate."

Up to the time of the hearing, the industry had not shipped a substantial volume of traffic, having used trucks to a considerable extent.

The Tennessee, Alabama & Georgia Railway Company, hereinafter called the Tennessee, did not intervene in this proceeding, but its general freight agent testifying on behalf of the applicant, stated that its railroad extends northerly from Gadsden, Ala., to Chattanooga, 92 miles. It makes connections with various trunklines at its termini, and its business is largely dependent upon traffic handled in interchange with those lines. The witness alleged that the Tennessee has been denied considerable traffic, destined

to or shipped from the Boyce area, because of the restrictive provisions of the tariff governing switching operations in that area. It is his understanding that the area would be open to reciprocal switching if the proposed line were constructed, and that the Tennessee would thereby recover much of the business that it has lost since the reciprocal switching arrangements at Boyce were canceled.

A member of the executive committee of the Chattanooga Chamber of Commerce and the traffic manager of the Chattanooga Manufacturer's Association, the latter being composed principally of manufacturing firms in the Chattanooga area, testified on behalf of the applicant. The gist of their testimony is that the industries in the Boyce area should have the services of two lines of railroad; that [374] direct access to the lines of both the Southern and the applicant would place the area in a position whereby it would be easier to induce other industries to settle in that locality; and that the industries never worried much about their transportation service prior to the time of removal of the Boyce area from the Chattanooga switching district.

A member of the Georgia Public Service Commission presented considerable testimony concerning the early history of the Western & Atlantic Railway which joined in the instant application. As previously indicated, that railway is owned by the State of Georgia and has been operated under lease by the applicant for many years. The State asserts that it has a vital interest in the applicant's proposal by virtue of such ownership. Its interest arises from the fact that, in accordance with the terms of the present 50-year lease, which expires on December 27, 1969, all additions and betterments made upon the leased line will revert to and become the property of the State; and that, if the applicant's proposed line were constructed, the State would gain a sizeable increase in the value of its railroad property. The rental, under the terms of the present lease,

is $540,000 annually, plus $60,000 a year for additions and betterments to the line.

Testimony on Behalf of the Southern

The Southern system operates 8,016 miles of railroad. It serves every State east of the Mississippi River and south of the Ohio and Potomac Rivers, except West Virginia, and reaches all important industrial centers in the South except Nashville, and Montgomery, Ala. The northern points of the Southern are Cincinnati, Ohio, and Washington, D. C. It serves all South Atlantic ports from Norfolk Va., to Jacksonville, Fla., except Wilmington, N. C., and reaches the gulf ports of Mobile, Ala., and New Orleans, La. Its western gateways are Memphis, and St. Louis, Mo.

Accordingly, it has the ability and capacity to handle traffic between the industries at Boyce and points within the territory described. The train service afforded by the Southern over many of the system lines previously has been shown.

The Southern showed that revenues which accrued to its system lines from freight traffic handled to and from the industries in the Boyce area from July 1, 1952, to June 30, 1955, amounted to $98,917 during the first 6 months of 1952; $350,812 in 1953; $414,053 in 1954; and $204,680 during the first 6 months of 1955. The revenues of the Southern were about 60 percent of the revenues accruing to all rail carriers from traffic to and from those industries. The general freight traffic manager of the Southern stated that, in his opinion, the industrial development of the Boyce area in the future will increase to the extent that its traffic will be 2 or 3 times greater than at present, but [375] that the Southern can proyide all the additional rail-transportation facilities necessary to handle such traffic no matter what the increase in volume may be. He stated also that

the applicant's proposed line is designed to take away a substantial portion of the traffic regardless of the extent to which the volume may increase in the future.

MATTERS RELATING TO JURISDICTION

In support of its contention that we have no jurisdiction in the premises, the applicant argues that the question should be determined in the light of the decision of the United States Court of Appeals in *Pennsylvania R. Co.* v. *Reading Co.*, 226 F. 2d 958, decided November 2, 1955, wherein the court affirmed the opinion of the United States District Court, 132 F. Supp. 616, finding that the track connection involved in that proceeding was an "industrial spur," the construction of which was permissible under section 1 (22) of the act without procuring a certificate of public convenience and necessity from us. We believe that the facts involved in the instant proceeding from a jurisdictional standpoint more closely resemble those in *Union Pac. R. Co.* v. *Denver & R. G. W. R. Co.*, 198 F. 2d 854, decided July 18, 1952. The court of appeals there confirmed the opinion of the United States District Court for the District of Utah, Central Division, holding that the trackage involved was an extension within the meaning of section 1 (18) of the act. These cases are discussed in *Alabama G. S. R. Co., Construction*, 295 I. C. C. 237, and the detail with respect thereto need not be repeated herein.

Questions relating to jurisdictional matters of the nature raised by the applicant in this proceeding have been considered and discussed in numerous cases decided by us and by the courts. None of them prescribes any concrete rules or formulas whereby a line of railroad partaking of the nature of a spur, industrial, or switching track, may be easily distinguished from an extension of a line of railroad. The line of demarcation between them has been closely drawn in many instances, and the question of our jurisdic-

tion has been determined in the light of the factors peculiar to each individual case. These include, among other things, matters pertaining to the purpose of the track sought to be constructed and the use to be made of it; the question whether new routes in interstate commerce would be established through the use of such track; and whether the construction and operation of the proposed track would constitute an invasion of another carrier's territory. In *Texas & P. Ry. Co.* v. *Gulf, C. & S. F. Ry. Co.*, 270 U. S. 266, the Supreme Court of the United States said:

> "A truer guide to the meaning of the terms extension and industrial track, as used in paragraphs 18 to 22, is furnished by the context and by the relation of [376] the specific provisions here in question to the railroad policy introduced by Transportation Act, 1920. * * *
>
> "When the clauses in paragraphs 18 to 22 are read in the light of this congressional policy, the meaning and scope of the terms extension and industrial track become clear. * * * where the proposed trackage extends into territory not theretofore served by the carrier, and particularly where it extends into territory already served by another carrier, its purpose and effect are, under the new policy of Congress, of national concern. For invasion through new construction of territory adequately served by another carrier, like the establishment of excessively low rates in order to secure traffic enjoyed by another, may be inimical to the national interest. If the purpose and effect of the new trackage is to extend substantially the line of a carrier into new territory, the proposed trackage constitutes an extension of the railroad within the meaning of paragraph 18, *although the line be short and although the character of the service contemplated be that commonly rendered to industries by means of spurs or industrial tracks.*" (Italics supplied.)

On oral argument, counsel for the applicant contends that before the rule with respect to our jurisdiction, as enunciated by the Supreme Court in the latter case, is applicable there must be found to exist three conditions; namely, (1) the territory sought to be reached must be new to the applicant, (2) it must be adequately served by the existing carrier, and (3) the proposed construction must be found to be inimical to the public interest. He states that the Boyce area is not new to the applicant; that it cannot be served adequately by the Southern; and that the proposed construction would not be an invasion of Southern's territory and would be beneficial to the public, and that therefore the above-quoted case is not applicable.

We are not in accord with the above stated contentions of counsel. We construe the words of the Court to mean that extension by a carrier of its line into territory served by another carrier may be inimical to the public interest, and therefore such an extension necessarily is within our jurisdiction requiring our determination of the question of the public convenience and necessity, regardless of the nature and extent of the extension.

As a guide for our jurisdictional determination in this proceeding, we are of the opinion that we have only to follow the precepts contained in the last sentence of the above-quoted decision. The record clearly shows that the purpose and effect of the applicant's proposal is to extend its line substantially. This leaves one remaining factor which involves the question as to whether the area to be reached by the proposed line is within the meaning of the term "new territory" as contemplated by the Court.

It is true that one side of the Boyce area is skirted by parallel main lines of both the applicant and the Southern. However, the applicant never had tracks within the area, and there is nothing to indicate [377] that it ever had the intention of building any prior to the advent of the heavy

industries. On the other hand, the Southern has performed the rail services for all industries in the area, both new and old, since 1898. The applicant cannot justly claim that the area is within its territory on the strength of a mere showing that it serves the general area. The locations of the industries are such that the applicant's main line would be extended a distance of over 4 miles in order to reach them.

We cannot conclude that the mere presence of a railroad in a general area gives it a right to serve all industries anywhere within such undefined geographical area. If such were the case, the doctrine of *Texas & P. Ry. Co. v. Gulf, C. & S. F. Ry. Co., supra,* holding that there may be an invasion although the line be short and the character of service contemplated be that commonly rendered to the industries by means of spurs or industrial tracks, never would be applicable. The fact is that both the Southern and the applicant served the general area involved herein just as both The Texas and Pacific Railway Company and the Gulf, Colorado and Santa Fe Railway Company did in the case just cited, and that the Southern alone serves the specific area involved just as the Texas & Pacific alone serves the specific area and was held to have the right to continue such service without interference by a competing carrier.

Under the foregoing circumstances, we are of the opinion (1) that the Boyce area is a territory served exclusively by the Southern, (2) that the proposed construction would constitute an invasion of that territory, and (3) that the area falls within the meaning of the term "new territory" as contemplated by the court in *Texas & P. Ry. Co.* v. *Gulf, C. & S. F. Ry. Co., supra.* We believe that we have jurisdiction in the premises, and, accordingly, the motion to dismiss the application will be overruled.

Matters Relating to Public Convenience and Necessity

On oral argument, counsel for the applicant requested that we approach the matter of public convenience and necessity in accordance with basic principles established in the past by the Commission and the courts. They contend that such principles were instituted to prevent the building of unnecessary lines of railroad, the waste of resources, and the improvident and unnecessary expenditure of carrier funds in the construction and operation of lines which are not needed to insure adequate service. We are wholly in accord with those contentions. With reference to our duty in arriving at a determination of the matter, they refer to *Chesapeake & O. Ry. Co.* v. *United States*, 283 U. S. 35, 42, in which the Supreme Court of the United States said:

[378] "There is no specification of the considerations by which the Commission is to be governed in determining whether the public convenience and necessity require the proposed construction. Under the Act it was the duty of the Commission to find the facts and, in the exercise of a reasonable judgment, to determine that question."

The predominant factor suggested appears to involve the question of adequacy or inadequacy of service now afforded by the Southern in the Boyce area. The other factors involve matters relating to the geographical facts of the situations, the equities of the proposal, the needs of an expanding economy, the character of the traffic, and the advantages of market competition afforded to shippers through direct access to more than one line of railroad. Applicant contends that the question of adequacy or inadequacy of service is not limited to the actual switching performed by the Southern in the Boyce area but that it

relates also to matters pertaining to routes and rates, car supply, expeditious movement of traffic in line-haul service, transit privileges, loss-and-damage claim handling, adjustments of various kinds, and continuity of service in the event of strikes on one line or the other. Counsel believe that inadequacy of the present service afforded by the Southern can be established even though there has been no specific showing of deficiency in service; that inadequacies of service are inherent in situations where an area is served by only 1 line of railroad; and that shippers are better off when they have the services of more than 1 line of railroad.

Witnesses for the industries in the Boyce area have not seriously disputed the adequacy of the Southern's service, and their testimony indicates that they want another line of railroad primarily for bargaining purposes. The industries served by the Southern's river track support the application almost entirely for the reason that they are not accorded reciprocal switching. Practically all of their existing difficulties, including adequate transit privileges, will be satisfied if they are accorded reciprocal switching, and that matter is before the Commission and will be determined in an appropriate proceeding. Vague references to obtaining a more dependable car supply are not convincing.

Conclusion and Findings

It is doubtful that the rail-transportation service rendered to any industry served by a single carrier meets all the requirements of "adequate service" which the applicant believes should be accorded the industries in the Boyce area. We have found, in many cases, that industries desire the service of as many railroads as possible, regardless of the precepts of Congress embodied in its national transportation policy. Measured by the standard of service ordinarily [379] performed by railroads throughout the

country, we believe that the record supports a conclusion that the service accorded by the Southern to the industries in the Boyce area is adequate to meet all the reasonable traffic demands of those industries and, under that circumstance, the proposed extension, costing over one-half million dollars, would be an expenditure of money not in furtherance of the national transportation policy, and would be inimical to the public interest.

We have reviewed the exceptions to the examiner's proposed report, the findings requested therein, and the contentions of all parties as to either fact or law. Matters pertaining thereto which are not discussed herein, or reflected in our findings and conclusions, have been given due consideration and are found to be either without material significance or not justified.

We find (1) that the proposal herein is a matter within our jurisdiction under section 1 (18) of the act, and (2) that the present and future public convenience and necessity are not shown to require construction and operation by The Nashville, Chattanooga & St. Louis Railway and the Western & Atlantic Railroad of the line of railroad in Hamilton County, Tenn., described herein. An appropriate order will be entered, overruling the motion to dismiss and denying the application.

APPENDIX C

Order of September 4, 1956.
Interstate Commerce Commission
Finance Docket No. 18942

Nashville, Chattanooga & St. Louis Railway, *et al.*
Construction

APPENDIX C

ORDER

At a Session of the Interstate Commerce Commission, Division 4, held at its office in Washington, D. C. on the 4th day of September, A.D. 1956.

Finance Docket No. 18942
Nashville, Chattanooga & St. Louis Railway, et al
Construction

Investigation of the matters and things involved in this proceeding having been made, a hearing having been held, and said division having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof;

It is ordered, That the motion to dismiss the application herein on jurisdictional grounds, be, and it is hereby, overruled.

And it is further ordered, That the application herein be, and it is hereby, denied.

By the Commission, division 4.

HAROLD D. McCOY,
Secretary.

(SEAL)

APPENDIX D

Order of February 12, 1957
Interstate Commerce Commission
Finance Docket No. 18942
Nashville, Chattanooga & St. Louis Railway, *et al.*
Construction

APPENDIX D

ORDER

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 12th day of February, A.D. 1957.

Finance Docket No. 18942
Nashville, Chattanooga & St. Louis Railway, et al.
Construction

It appearing, That the Commission, by division 4, in its report and order dated September 4, 1956, in the above-entitled proceeding, denied the application of The Nashville, Chattanooga and St. Louis Railway and the Western & Atlantic Railroad to construct and operate a line of railroad in Hamilton County, Tenn., described in the report aforesaid and, overruled a motion to dismiss said application on jurisdictional grounds;

It further appearing, That on October 15, 1956, the aforesaid applicants filed a petition for reargument and reconsideration and renewed their request for dismissal of the application for want of jurisdiction, or, in the alternative, that the Commission find that public convenience and necessity require and will require the authority sought;

It further appearing, That on October 22, 1956, Cramet Inc., an intervener in support, filed a reply in behalf of the said petition of applicants;

It further appearing, That on November 13, 1956, Southern Railway Company, The Cincinnati, New Orleans and Texas Pacific Railway Company, and Georgia Industrial Realty Company, interveners in opposition, filed a reply in opposition to the aforesaid petition of applicants;

And it further appearing, Upon consideration of the record herein, and the contentions set forth in said petition and replies, that there has been presented no error of fact or law with respect to the matters complained of by the petitioners, and that no showing has been made warranting reconsideration or further hearing in the said proceeding or dismissal of the said application on jurisdictional grounds;

It is ordered, That said petition be, and it is hereby, denied.

By the Commission.

HAROLD D. McCOY,
Secretary.

(SEAL)

APPENDIX E

Statutes Involved

Interstate Commerce Act, ~~49~~ 41 Stat. ~~543~~ 477, 49 U.S.C., Section 1(18) and 22).

APPENDIX E.

STATUTES INVOLVED.

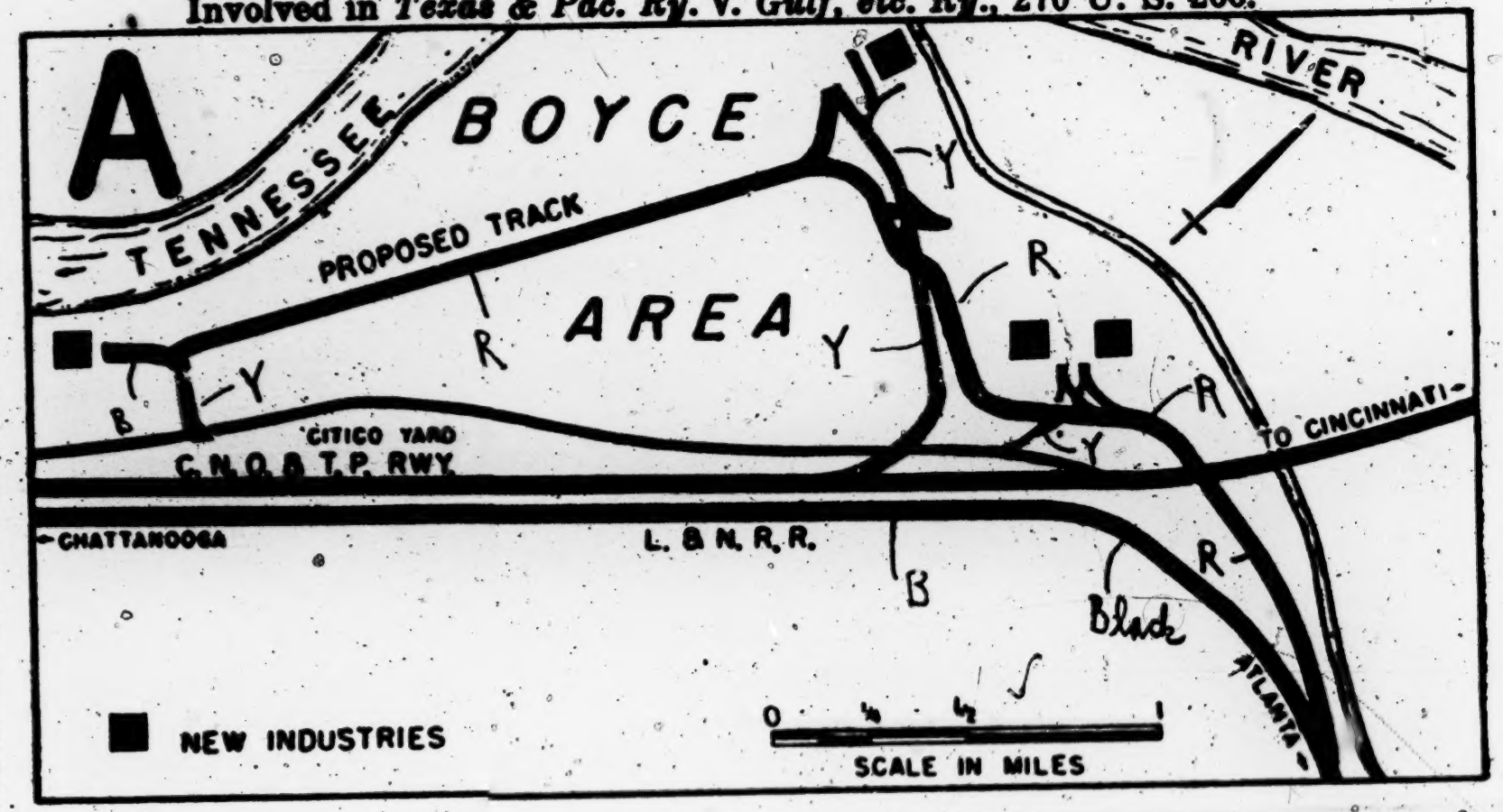
Interstate Commerce Act, 41 Stat. 477, 49 U. S. C., Section 1(18) and (22).

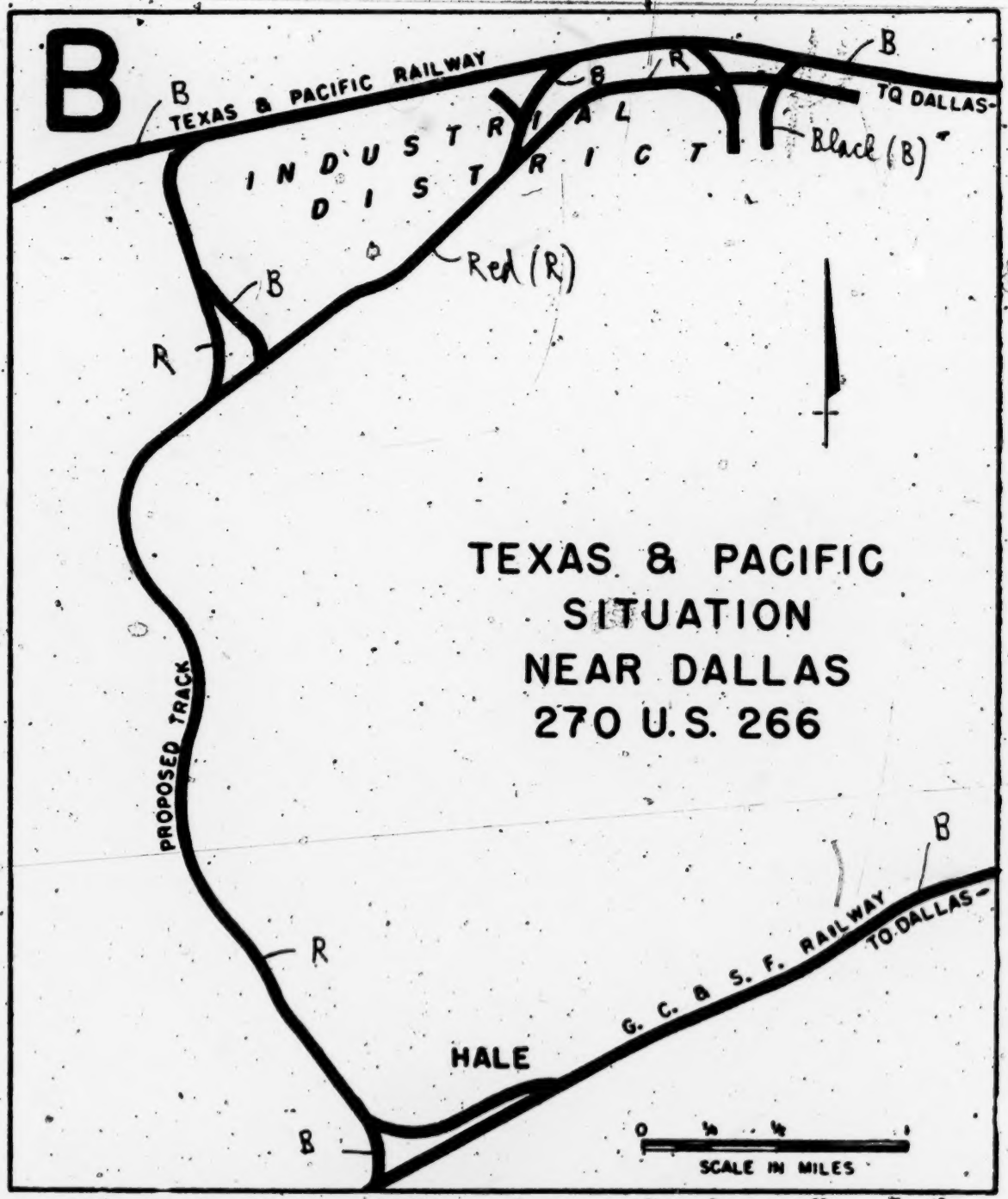
1(18). After ninety days after this paragraph takes effect no carrier by railroad subject to this part shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this part over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this part shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment. Nothing in this paragraph or in section 5 shall be considered to prohibit the making of contracts between carriers by railroad subject to this part, without the approval of the Commission, for the joint ownership or joint use of spur, industrial, team, switching, or side tracks.

1(22). The authority of the Commission conferred by paragraphs (18) to (21), both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching or side tracks, located or to be located wholly within one State, or of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation.

APPENDIX F

Drawings Showing Proposed Trackage at Boyce, Tennessee, and that Involved in *Texas & Pac. Ry.* v. *Gulf, etc. Ry.*, 270 U. S. 266.





LEGEND: Black—existing main lines; red—proposed trackage; yellow—Southern Railway's existing industrial tracks; blue—new industries.

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FILED
MAR 27 1958
JOHN T. FEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 774.

STATE OF GEORGIA,
WESTERN & ATLANTIC RAILROAD, and
LOUISVILLE AND NASHVILLE RAILROAD COMPANY, - - - - - Appellants,

versus

UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION,
ET AL., - - - - - - - - - - Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA.

BRIEF IN OPPOSITION TO MOTIONS TO AFFIRM.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 774.

STATE OF GEORGIA,
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COMPANY, - - - - - - - - - *Appellants,*

v.

UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION,
ET AL., - - - - - - - - - - *Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA.

BRIEF IN OPPOSITION TO MOTIONS TO AFFIRM.

STATEMENT.

As provided for by the Court's Revised Rule 16, appellants file this brief in opposition to the motions to affirm filed by the United States of America and the Interstate Commerce Commission, herein referred to jointly as the "Government," and by Southern Rail-

way Company and certain of its affiliates, herein referred to jointly as "Southern." The motions fail to show the asserted lack of substantiality of the questions presented by the Jurisdictional Statement and accordingly should be denied.

The Government's contentions are, generally speaking, the same as those advanced by Southern, with two exceptions to be noted. In substance, the contentions common to both the Government and Southern appear to be:

That the rule relating to invasion of territory of one railroad by another through new track construction, promulgated in *Texas & Pac. Ry. v. Gulf, etc., Ry.*, 270 U. S. 266 (1926), is applicable here because it has been held to control in other cases "under the circumstances present here" (Government's motion, p. 6);

That the evidence is "more than sufficient to support the Commission's conclusion" (Government's motion, p. 7) as to adequacy of existing service at Boyce and as to the public interest;

That the district court "gave extended consideration to both the factual and legal aspects" (Government's motion, p. 8) of the question of the Commission's jurisdiction, and that acceptance by the court of the Commission's findings on this issue was not an abdication of its judicial duty "to determine the legal significance of these facts" (Government's motion, p. 8).

In addition, Southern, but not the Government, makes the assertion, demonstrably erroneous, that the issues are moot (Southern's motion, p. 15) and that,

should appellants' position be upheld, the Commission's authority would be "drastically" restricted and other rail carriers would suffer "disastrous" effects (Southern's motion, pp. 4, 16).

The arguments of both the Government and Southern rely upon considerations and facts which for the most part do not relate to the issue of jurisdiction—the central issue before the Court.

In the section which follows, appellants will respond to each of appellees' arguments which seem to require comment additional to the presentation in the Jurisdictional Statement.

ARGUMENT.

1. The Texas & Pacific Case Does Not Control Here.

(A) THE TEXAS & PACIFIC RULE IS LIMITED IN APPLICATION BY ITS OWN TERMS.

Appellants are in accord with the suggestion (Southern's motion, p. 13) that the so-called "doctrine" of *Texas & Pacific* should be viewed in the light of the entire decision and consonant with its purpose. But in so viewing that doctrine, it should be remembered that that case did not, as does this one, involve an attempt by a subservient carrier to eject its grantor from territory bordering the grantor's right of way.

The opinion in that case does not purport to "set forth *the** principles governing the determination as to whether a proposed track is an 'extension'" (South-

*Emphasis supplied by appellants here and elsewhere unless otherwise noted.

ern's motion, p. 11), excluding all other considerations; nor has it been followed in "hundreds of cases" (Southern's motion, p. 11). It merely provides a rule of construction which removes from the exception provisions of Section 1, paragraph (22) of the Interstate Commerce Act, trackage, normally within the terms of that paragraph, which would constitute an invasion of traffic territory and which would create a competitive situation that might prove harmful to both the carriers and the public. The discussion appearing in the dicta at pages 277-278 of 270 U. S. deals in a general way with considerations applicable to all railroad track construction subject to Commission authority, including those cases where the Commission's jurisdiction is unquestioned.

In the finality, the *Texas & Pacific* case provides for an exception to the exceptions included in paragraph (22).* And if, as this Court has held—*Piedmont & Northern Ry.* v. *Comm'n.*, 286 U. S. 299, 311, 312,—the exceptions or exemptions made by that paragraph must be narrowly construed, then *a fortiori* the rule of *Texas & Pacific* itself should be all the more narrowly construed. The case has been distinguished as often as it has been followed, most notably in *Missouri, K. & T. R. Co.* v. *Texas & N. O. R. Co.*, 172 F. 2d 768 (C. A. 5, 1949), and *Pennsylvania Railroad Co.* v. *Reading Co.*, 132 F. Supp. 616 (D. C., E. D. Pa., 1955), affirmed 226 F. 2d 958 (C. A. 3, 1955).

*The statutes involved, paragraphs (18) and (22) of Section 1 of the Interstate Commerce Act, are reproduced as Appendix E to the Jurisdictional Statement.

Contrary to Southern's assertion (motion, p. 12) that appellants' position is based upon a single sentence from *Texas & Pacific,* the discussion beginning at page 13 of the Jurisdictional Statement includes an analysis of the opinion and appropriately quotes not only the rule but the underlying reasoning. The language there quoted epitomizes "the rationale of the entire opinion" (Southern's motion, p. 13). The rule itself makes clear that the Court restricted its application to those instances where a railroad undertakes to reach "new territory"; that is, "territory not theretofore served by the carrier" (270 U. S. at p. 278). Southern recognizes this to be the correct interpretation by its labored effort to show that appellants are not serving Boyce.

(B) THE BOYCE TEAM TRACK ESTABLISHES THE FACT OF SERVICE BY APPELLANTS, BUT IS ONLY ONE OF SEVERAL FACTORS IN THIS CASE SHOWING THAT NO INVASION WOULD RESULT FROM THE PROPOSED CONSTRUCTION.

Southern seeks summarily to dispose of the important jurisdictional fact of appellants' service by team track by indulging in wholly unsupported speculation as to the "unlikely" use of that facility (motion, p. 13). It should not be necessary to add counter speculation that it is much more unlikely that a carrier would maintain a facility for more than forty years if it were not being used. Such speculation is beside the point; the team track is and for many years has been available and offered to the public, whether or not the record shows actual use, and establishes the fact of service by appellants.

The force of this fact cannot be overcome by the specious argument that if appellants' team track service, together with other factors here present, is held to be enough to remove the proposed trackage from the reach of the *Texas & Pacific* rule, then any carrier providing such service would, *ipso facto,* be free to construct whatever tracks it may desire, irrespective of length and other considerations (Southern's motion, p. 16). That the argument is unsound is clear, for it requires ignoring the many other factors involved in the law governing track construction reviewed in the Jurisdictional Statement at pages 22-25.

(C) APPELLANTS' SERVICE THROUGH RECIPROCAL SWITCHING REMOVES THE INSTANT CASE FROM THE REASONING AND RULE OF TEXAS & PACIFIC.

Reciprocal switching is germane to this case only insofar as it establishes the jurisdictional fact of service by appellants. On this specific point, Southern cites only one case (*Missouri Pacific R. Co.* v. *Chicago, R. I. & P. R. Co.,* 41 F. 2d 188 (C. A. 8, 1930)), in support of the argument that appellants' service by this means is not "service" within the contemplation of the *Texas & Pacific* case (motion, p. 16). Reciprocal switching was mentioned incidentally in the *Missouri Pacific-Rock Island* case, but so far as appears from the opinion, no issue was made of it.

The correctness of the decision, if it depended at all upon reciprocal switching as a factor, is questionable as it is not in accord with the weight of authority, which holds that service through reciprocal switching

is the service of the line-haul carrier. Please see *Missouri Pac.* v. *Reynolds-Davis,* 268 U. S. 366, 369 (1925); *Crossfield Ice Co.* v. *Southern Ry. Co.,* 232 I. C. C. 795 (1939); *Automobiles to Southern Ports for Export,* 225 I. C. C. 225, 229 (1937); *Ezee Flow Corp.* v. *Illinois Central R. Co.,* 287 I. C. C. 281, 284 (1952); 44 Stat. 1448, 49 U. S. C., Sec. 20(11).

However, there was no indication in the *Missouri Pacific-Rock Island* case that the carrier there opposing the new construction was undertaking to oust its grantor from an area bordering the grantor's right of way and which had been long served by the grantor through means other than direct track connection. That is what Southern is seeking to do here.

(D) FACTORS OTHER THAN APPELLANTS' ACTUAL SERVICE AT BOYCE REFUTE THE FINDINGS RELATING TO INVASION.

Other facts and circumstances, the significance of which was unmentioned by either the Commission or the district court, disprove the idea that the proposed construction would be an invasion.

The first railroad service at Boyce was established by appellants upon completion of the Western & Atlantic Railroad more than a century ago. Continuously since that time they have held themselves out to serve, and have served, Boyce and the surrounding area as the need for transportation has been made known to them. That service has been effected by the two means already discussed.

The appellants' proposal to provide direct service rather than service through the agency of Southern

resulted from requests by shippers who had only recently located at Boyce. Construction of appellants' track would be simply another phase of the fulfillment of their holding out to serve.

This distinction from the *Texas & Pacific* case has been noted by the courts as tending to disprove invasion. *Chicago, M. St. P. & P. R. Co.* v. *Chicago & E. I. R. Co.*, 198 F. 2d 8 (C. A. 7, 1952); *Pennsylvania Railroad Co.* v. *Reading Company*, 132 F. Supp. 616 (D. C., E. D. Pa., 1955), affirmed 226 F. 2d 958 (C. A. 3, 1955). It is likewise significant here.

2. The Re-establishment of Reciprocal Switching at Boyce Does Not Affect the Vitality of the Issues Presented.

By injecting the discussion of the case of *Cramet, Inc.* v. *Alabama Great Southern R. Co., et al.*, 298 I. C. C. 439, Southern (motion, p. 14) has confused the issue of public convenience and necessity, which is not before the Court on this appeal, with the issue of the Commission's jurisdiction; and in doing so it has inexplicably concluded that the unresolved jurisdictional question presented has become moot.

Appellants here assert a statutory right to construct the proposed trackage without Commission approval on the ground that the trackage falls within the provision of the statute—paragraph (22) of Section 1 of the Interstate Commerce Act—exempting it from Commission authority. They maintain that that right has been denied them as the result of misapplication of the statute and misapplication of a rule

of construction adopted by this Court, in the *Texas & Pacific* case, by which the jurisdiction of the Commission in such matters is determined in some cases. That right is not protected, or affected, by the Commission's action in the *Cramet* case.

That none of the issues has become moot should be obvious, for whether the Commission acted within its statutory authority in this case cannot be determined by what it did in a dissimilar and unrelated proceeding involving a determination of the lawfulness of Southern's action in suspending reciprocal switching at Boyce. And although all of the discussion on this subject, except as it tends to prove service by appellants at Boyce, has no bearing on the jurisdictional question, its relation to the instant case, if indeed there is any, must be clarified in view of Southern's representations concerning it.

Appellants did not seek "in two separate proceedings to secure *either* a new line of railroad into Boyce *or* reciprocal switching", as is asserted at page 15 of Southern's motion. They were the moving parties only in the application proceeding here considered. This proceeding was commenced at the request of the new industries at Boyce and had as its purpose, not to secure "a new line of railroad into Boyce," but rather, as is apparent from this appeal, a clarification of appellants' right to construct an industrial lead from their main line which already runs into and passes through Boyce.

The other of the "two separate proceedings" was a complaint instituted by Cramet, Inc., in the case re-

ferred to above which arose from Southern's action in removing that shipper from the Chattanooga switching district, thus depriving it of reciprocal switching. Appellants were joined with Southern as *defendants* in that complaint, but, under the circumstances presented, they did not defend Southern's action. Furthermore, the object of the complaint was not to "secure" reciprocal switching; the shipper had already had that service when it located at Boyce. It was seeking merely to regain what Southern had unlawfully taken away.

The foregoing makes it clear that there is no substance to Southern's claim that re-establishment of reciprocal switching at Boyce "makes the appeal in this proceeding moot." The re-establishment of reciprocal switching leaves unanswered the jurisdictional question upon which an important right of appellants depends. In seeking a determination of that question, appellants neither seek nor require this Court's approval of the proposed construction, as Southern argues (motion, p. 15).

Southern urges (motion, pp. 17-18) that continued assertion by appellants of the right to serve with their own facilities industries they already serve by other means is "self defeating." But Southern overlooks the fact that such prior service is the prime factor which removes this case from the scope of the *Texas & Pacific* rule. It also overlooks the fact that the effort on the part of a rail carrier to *improve* its service to a shipper does not prove a lack of service theretofore but the existence of such prior service.

3. Sustaining Appellants' Position in This Case Would in No Way Diminish the Commission's Authority, Nor Would It Enable Carriers to Avoid the Certificate Requirements of the Act Merely by Showing Service by Reciprocal Switching.

The contention of Southern that to uphold appellants' position that service through reciprocal switching under the circumstances here presented renders the *Texas & Pacific* case inapplicable "would severely limit the jurisdiction of the Interstate Commerce Commission" and "would emasculate the powers of the Commission" (Southern's motion, pp. 4, 17), is the direct outgrowth of the scope attributed by both Southern and the Government to that case. They view it, not as providing a simple rule of construction to meet a well-defined situation, but rather as constituting an all-inclusive set of "principles" to be followed in the determination of Commission authority. Such an interpretation would effectually repeal the exemption provisions of the statute, irrespective of other considerations, in all cases where carriers undertake to provide their own facilities in the performance of competitive service already rendered through other means.

Corollary to Southern's contention that the Commission's authority would be destroyed if the *Texas & Pacific* rule were held inapplicable here, is its suggestion that "If appellants' argument is accepted, then it would be possible for any rail carrier, where there was reciprocal switching, to build an extension of railroad to any plant which had reciprocal switching"

(Southern's motion, p. 16). The answer to both arguments is that a holding of inapplicability of the rule of the *Texas & Pacific* case could not in itself relieve a carrier from the certificate requirements of Paragraph 1(18), for any proposed new trackage would still be subject to classification as an extension of line under that section or a spur or industrial lead under paragraph 1(22) in accordance with the cases reviewed in the Jurisdictional Statement at pages 22-25.

A correct statement of appellants' objective in this litigation, contrary to Southern's conception given at page 4 of its motion, is that they seek simply to exercise a right provided by statute. That right should not be denied or impaired merely because its exercise would result in confining the Commission to the authority expressly conferred by that statute.

4. Determination of Commission Jurisdiction Is a Judicial Function; Therefore, the Court's Power to Review Commission Action on That Issue Is Plenary.

Appellants have been denied one of the most important rights possessed by railroads, that is, the right to build trackage to serve their customers. The denial has resulted from erroneous administrative action and inadequate judicial review of that action. This is a case, therefore, coming squarely within the reasoning and decision in *Crowell* v. *Benson*, 285 U. S. 22 (1932), wherein "the difference in security of judicial over administrative action" when fundamental rights are in question was emphasized (285 U. S., at page 61).

The *Crowell* case involved a dispute as to the propriety of the extent to which a district court had gone in determining lack of jurisdiction and consequent unlawfulness of administrative action under the Longshoremen's and Harbor Workers' Compensation Act. The action of the district court in hearing the matter *de novo* was upheld because the necessary determinations of fact were held to be "fundamental or 'jurisdictional', in the sense that their existence is a condition precedent to the operation of the statutory scheme" (285 U. S., at page 54). That is exactly the type of determination involved in this case.

The decision in *United States* v. *Idaho*, 298 U. S. 105 (1936), is in harmony with the *Crowell* case. There the district court heard new evidence in addition to that contained in the record made before the Commission on the very question presented here. The court's action in this respect was upheld as being not improper.

Appellants did not seek a trial *de novo*, nor do they now contend that such a course should have been pursued by the trial court, as Southern states (motion, p. 22). They do insist, however, that a proper determination by the district court of the Commission's jurisdiction could be made only by an examination of the record as well as the Commission's findings in order to ascertain whether the latter are supported by substantial evidence or whether, because of conflicts in or absence of facts, they should be revised or set aside. The opinion of the District Court indicates that this was not done. Not only did the court say that the facts were "not subject to review by this Court" (Jur. St.,

App. A-3), but it is apparent that it took its statement of facts from the Commission's report (Jur. St., App. A-3). Further, the court said: "Although *these findings were made by the Commission* in connection with the merits of the application . . . . they stand in the record for whatever purpose they may serve on the jurisdictional question as well" (Jur. St., App. A-11). And in rejecting the authorities cited by appellants in support of their position, the court said: "*In light of the finding of the Commission of the basic facts* set out above we do not believe that this case is controlled by any of them" (Jur. St., App. A-13).

From the foregoing it is clear that it is not appellants' position, as charged, that the Commission's jurisdictional findings "have no significance" (Southern's motion, p. 23) and, further, that Southern's characterization of such findings as "undisputed" (motion, p. 23) is wrong.

The case of *Gray* v. *Powell,* 314 U. S. 402 (1941), is represented by Southern as having commenced "a line of decisions" narrowly restricting court review of administrative action, "even with respect to questions that would appear to be more legal than factual" (motion, p. 22). But there was no jurisdictional issue presented in that case. It involved reviewability of an administrative determination made pursuant to a statute which expressly provided that the agency's findings of fact were to be conclusive. The only case in which this Court has cited *Gray* v. *Powell* was decided fourteen years later, being *Mitchell* v. *Budd,* 350 U. S. 473 (1955). As in the *Gray* case, no question

of jurisdiction was in issue. The controversy arose from an administrative officer's interpretation of regulations he himself had promulgated pursuant to unquestioned statutory authority. Neither of these decisions is authority for the district court's declining to review the record in this case.

CONCLUSION.

The arguments advanced by appellees fail to show a lack of substantiality of the questions presented by this appeal and the motions to affirm the lower court's judgment should accordingly be denied.

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No. 774

In the Supreme Court of the United States

OCTOBER TERM, 1957

STATE OF GEORGIA, WESTERN AND ATLANTIC RAILROAD AND LOUISVILLE AND NASHVILLE RAILROAD COMPANY, APPELLANTS

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

MOTION TO AFFIRM

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MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1 (c) of the Revised Rules of this Court, appellees United States of America and Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from a final judgment entered on October 21, 1957, by a three-judge district court convened pursuant to 28 U. S. C. 2284 and 2325, dismissing a complaint seeking to set aside two orders entered by the Interstate Commerce Commission in a proceeding under Section 1 (18) of the Interstate Commerce Act in which the Nashville, Chattanooga & St. Louis Railway (N. C. & St. L.) and the Western

and Atlantic Railroad Company (W. & A.) jointly applied for a certificate of public convenience and necessity authorizing them to construct and operate a track approximately 4.04 miles long in Hamilton County, Tennessee. The authorization was sought to enable the applicants to switch loaded and empty cars between their main line and the tracks of industries located in the Boyce area of the switching district of Chattanooga, Tennessee.

Most of the Boyce area is within an outward bend of the Tennessee River and formerly was subject to periodic overflow. After flood control dams constructed by the Tennessee Valley Authority had eliminated such flooding, the Southern Railway Company, through a subsidiary, purchased much of the land for industrial purposes, and it has acquired a total of 765 acres at a cost of $1,172,842. Prior to completion of the flood control project, only four or five small industries, which are served by the Southern over a track known as the river track, and built more than 50 years ago, operated in the area. Since 1952, four large new industrial plants have located in the area, those of the Quaker Oats Company, Central Soya Company, Cramet, Inc., and Heavy Minerals Company. (J. St. App. B–4–B–7.)

The applicant's main line passes along the southern boundary of the Boyce industrial area, and thence to Chattanooga, a distance of 5.5 miles, and parallels in this stretch the main line of the Southern. The track which they proposed to construct would cross the main line of the Southern by means of an overhead bridge. It would extend northwesterly for a distance

of about 1.75 miles, and then southwesterly about two miles farther to the plant of the Quaker Oats Company. It would cross at grade Southern's river track within the Boyce industrial area, as well as certain highways. (J. St. App. B–10, App. F.)

For a period of at least 35 years prior to June 23, 1954, the Boyce area was included in the Chattanooga switching area and all railroads entering Chattanooga had access to the industries in the area through reciprocal switching arrangements with the Southern. The Southern performed all the switching at a rate of $12.73 per loaded car, which was absorbed by the participating carriers (J. St. App. B–12). By a tariff publication on June 23, 1954, Southern removed the industries served by its river track in the northeasterly portion of the Boyce area from the Chattanooga switching district (*ibid.*).[1] Complaints were filed with the Commission requesting elimination of the provisions of Southern's tariffs withdrawing the Boyce area from the Chattanooga switching district, and the Commission entered an order requiring Southern to restore the prior reciprocal switching (J. St. App. B–13). In a suit by Southern to set aside the order, a three-judge district court upheld its validity (*Southern Railway Co.* v. *United States,* 154 F. Supp. 562 (E. D. Va.)), and this Court affirmed the district

[1] The purpose of this action was to enable Southern to receive, in lieu of the switching charge of $12.73 per loaded car, a division of about 20% of the total revenues on the line-haul traffic moved by the applicants and participating carriers between their yards in Chattanooga and points throughout the country, but the tariff publication did not increase the freight rates to shippers in the Boyce area (J. St. App. B–12–B–13).

court's judgment on January 13, 1958 (No. 579, this Term). 355 U. S. 370.

In the instant case, the State of Georgia intervened in support of the application filed by N. C. & St. L., and W. & A., and the Southern Railway Company and two of its subsidiaries intervened in opposition. Thereafter, the applicants and the State of Georgia filed a joint motion to dismiss the application upon the ground that the track proposed to be constructed was a "spur, industrial, team, switching or side" track located wholly within one state, which Section 1 (22) of the Act excludes from the Commission's jurisdiction under Section 1 (18).

The Commission, by Division 4, determined that the jurisdictional question raised by the motion to dismiss could not be resolved until after all relevant facts had been developed upon a hearing, and deferred consideration of the motion pending a full hearing. On September 4, 1956, Division 4 issued a report in which it found that it had jurisdiction of the application under Section 1 (18) of the Act, but that public convenience and necessity do not require the proposed construction (J. St. App. B–19–B–25). An order denying the application was accordingly entered on the same day (J. St. App. C–1), and the full Commission by its order of February 12, 1957 denied a petition for reconsideration (J. St. D–1–D–2).

ARGUMENT

1. Appellants contend that the proposed trackage is not an "extension" under the provisions of Section 1 (18) of the Interstate Commerce Act, but is a "spur"

or "industrial" track to be constructed within a single state, which is exempted by Section 1 (22) from the certificate requirements of Section 1 (18).

This Court in *Texas & Pacific Rwy. Co.* v. *Gulf, C. & S. F. Rwy. Co.*, 270 U. S. 266, enunciated clear and unmistakable standards for determining whether a proposed trackage is an "extension" of a line of railroad or a "spur" or "industrial" track. The Court there pointed out that Congress, under the Transportation Act of 1920, undertook to develop and maintain an adequate railway system, and thereby recognized that preservation of the earning capacity and conservation of the financial resources of individual carriers is of national concern; that the property employed must be permitted to earn a reasonable return; that the building of unnecessary lines involves a waste of resources, the burden of which falls upon the public; that competition between carriers may result in harm to the public as well as in benefit; and that when a railroad inflicts injury upon its rival, it may be the public which ultimately bears the loss. 270 U. S. at 277.

The Court, construing the provisions of Sections 1 (18) and 1 (22) in the light of this Congressional policy, noted that the "spur, industrial, team, switching or side tracks" which are exempted from the requirements of Section 1 (18) by Section 1 (22), "are commonly constructed either to improve the facilities required by shippers already served by the carrier or to supply the facilities to others, who being within the same territory and similarly situated are entitled to like service from the carrier",

and that the construction of such tracks ordinarily involves only a small expenditure. *Id.* at 278. But there is, the Court said, an "extension" of a railroad within the meaning of Section 1 (18) if "the purpose and effect of the new trackage is to extend substantially the line of a carrier into new territory, * * * although the line be short and although the character of the service contemplated be that commonly rendered to industries by means of spurs or industrial tracks." *Ibid.*

The courts and the Commission have held that when an industry or industrial area is already served by one railroad, the construction of a track by another railroad to reach the same plant or area, under the circumstances present here, constitutes an invasion of territory and requires a certificate of public convenience and necessity. *Chicago, Milwaukee, St. P. & P. R. Co.* v. *Northern Pac. R. Co.*, 120 F. Supp. 710 (W. D. Wash.), affirmed 225 F. 2d. 840; *Union Pacific R. Co.* v. *Denver & Rio Grande Western R. Co.*, 198 F. 2d 854; *Chicago, B. & Q. R. Co. Construction*, 282 I. C. C. 539, 559 (1952); *Cleveland, C., C. & St. L. Ry. Co., Construction*, 267 I. C. C. 643, 646 (1947); *Pittsburgh C., C. & St. L. Ry. Co. Construction*, 244 I. C. C. 392 (1941); *Operation by L. A. & S. L. R. R.* 124 I. C. C. 207 (1927); and *Construction by Alabama, T. & N. R. Corp.*, 154 I. C. C. 308 (1929).

The track which the applicants sought to construct would be approximately 4.04 miles in length, first crossing three mainline tracks of Southern by means of an overhead bridge, and then crossing at grade other tracks of the Southern at least four times. The

estimated cost of the new track is $523,916.00 (Tr. 53; Exs. H–1, 5 and 6). Much of the land to be traversed was acquired by Southern for the industrial development of the area, and the track is designed to gain physical access to industries already located on the tracks of the Southern. Clearly, these and other factors are more than sufficient to support the Commission's conclusion that "the service accorded by the Southern to the industries in the Boyce area is adequate to meet all the reasonable traffic demands of those industries and under that circumstance, the proposed extension, costing over one-half million dollars, would be an expenditure of money not in furtherance of the national transportation policy, and would be inimical to the public interest" (J. St. App. B–25).

The district court held that the area which the appellants seek to reach is "new territory" to them because they are not now serving it in the sense in which the word "serve" was used in the *Texas and Pacific* case or in the sense in which the Southern is now serving it; that the proposed trackage represents a "*substantial* extension" because it involves substantial expenditures and runs a considerable distance; and that the building of the new tracks of significant mileage comes within the jurisdiction of the Comission when, as here, such construction involves substantial expenditure to duplicate existing adequate facilities, in order to tap an industrial area not presently reached by its own facilities (J. St. App. A–11).

2. Appellants contend (J. St. 26–29) that the district court's statement that the basic facts on which

the jurisdictional question turns "are supported by substantial evidence and are therefore not subject to review by this court" shows that the court fell short of its duty to review the Commission's determination of its own jurisdiction. But the court's acceptance of Commission findings for which there was substantial evidentiary support is not an abdication of its judicial duty to determine the legal significance of these facts with reference to the disputed jurisdictional issue. The court, in fact, gave extended consideration to both the factual and legal aspects of this issue (J. St. App. A-3–A-10). Moreover, appellants in the court below did not dispute, and they do not dispute in this Court, the "basic facts" relevant to the jurisdictional issue found by the Commission.

3. The Commission, in determining that the proposed track construction is not required by public convenience and necessity, found that under the existing circumstances the proposed expenditure would not be in furtherance of the national transportation policy and "would be inimical to the public interest" (J. St. 25). The court treated this finding as of some relevance to the question whether the proposed track would be an "extension" of the railroad's line or merely a "spur" or "industrial" track. Appellants do not contend that the court erred in regarding the finding of "inimical to the public interest" as relevant to the jurisdictional issue, but contend (J. St. 25–26) that the finding is unsupported by or contrary to the evidence.

In *Texas & New Orleans Railroad Company* v. *The Northside Belt Railway Company*, 276 U. S. 475, 479,

the Court said that the purpose of subsections 18 to 22 of Section 1 of the Act "is to prevent interstate carriers from weakening themselves by constructing or operating superfluous lines, and to protect them from being weakened by another carrier's operating in interstate commerce a competing line not required in the public interest." In the light of the purpose of the statute thus declared, we submit that there plainly was evidence to support the Commission's "inimical to the public interest" finding. There was evidence that Southern is presently furnishing, and is capable of furnishing all of the railroad service needed in the Boyce area (Tr. 303, 304); that construction of the proposed trackage, costing more than $500,000, would materially decrease Southern's revenues by diverting traffic which is now handles (Tr. 326–328); that the proposed track would complicate Southern's access to its own property and would require expensive cross-overs and create operational hazards (Tr. 266); that the Southern has acquired property in the Boyce area at a cost of nearly $1,175,000 for industrial development and has modernized its Citico yard, in the vicinity, at a cost of approximately $15,000,000 (Tr. 248–251); and that the proposed track would immeasurably lessen the value of Southern's holdings (Tr. 254).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decision below is correct and that the appeal presents no substantial question. The judgment of the district court should be affirmed.

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IN THE

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v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL., *Appellees*

On Appeal From the United States District Court for the Northern District of Georgia

MOTION TO AFFIRM

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 774

STATE OF GEORGIA, WESTERN & ATLANTIC RAILROAD, and LOUISVILLE AND NASHVILLE RAILROAD COMPANY, *Appellants*

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL., *Appellees*

On Appeal From the United States District Court for the Northern District of Georgia

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MOTION TO AFFIRM

Appellees, Southern Railway Company, The Cincinnati, New Orleans and Texas Pacific Railway Company,[1] and Georgia Industrial Realty Company,[2]

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[1] An affiliate of Southern Railway System, controlled by Southern Railway Company.

[2] Wholly-owned real estate subsidiary of Southern Railway Company.

pursuant to Rule 16, Paragraph 1(c), of the Revised Rules of this Court, move that the final judgment of the District Court be affirmed.

The Interstate Commerce Commission and the United States of America, appellees in this proceeding, also have filed a motion to affirm.

PRELIMINARY STATEMENT

This is a direct appeal from the final judgment of a three-judge District Court (convened pursuant to 28 U.S.C., 2284 and 2325) which upheld the validity of the report and order of the Interstate Commerce Commission of September 4, 1956, and the order of February 12, 1957, in Finance Docket No. 18942, *Nashville, Chattanooga & St. Louis Railway, etc. Construction.* (Appendices B-1, C-1, and D-1 to Appellants' Jurisdictional Statement.) The report and order dated September 4, 1956 (295 I.C.C. 363), overruled the motion of Louisville and Nashville (L&N)[3] to dismiss for lack of jurisdiction and denied the authority sought by the application. The order of February 12, 1957, denied the petition of L&N for reargument and reconsideration. The decision of the Court below is reported in 156 F. Supp. 711.

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[3] The original application with the Commission was filed by Nashville, Chattanooga & St. Louis Railway (NC&StL) and Western & Atlantic Railroad, leased to NC&StL by the State of Georgia. The proposed trackage would be a part of the leased Western & Atlantic. NC&StL has now been merged into L&N which is now lessee of Western & Atlantic. The term "appellants" will be used herein to designate the lessee railroad and lessor State of Georgia collectively, unless otherwise designated.

THE STATUTES INVOLVED

The questions presented arise under the provisions of the Interstate Commerce Act governing the construction of new lines of railroad and extensions of existing lines, and spur, industrial and other trackage. 49 U.S.C., Section 1(18) and 1(22). The statutes are reproduced in full in Appendix E to the Jurisdictional Statement.

QUESTIONS PRESENTED

The appellants, subsequent to filing an application with the Commission for authority to construct the proposed trackage under Section 1(18), filed a motion to dismiss on the grounds that the Commission had no jurisdiction over the application under Section 1(22).

In the complaint in the court below appellants contended that the Commission erred in finding it had jurisdiction under Section 1(18), and also argued that even if the Commission had jurisdiction it erred in finding that the public convenience and necessity had not been shown to warrant the construction of the proposed trackage. However, upon argument in the court below, appellants apparently abandoned their attack upon the Commission's finding with respect to public convenience and necessity. The court below found that on the issue of public convenience and necessity the findings of fact by the Commission were supported by substantial evidence in the record and the decision of the Commission was affirmed (Appendix A-13, Jurisdictional Statement). Appellants' Jurisdictional Statement ~~also~~ apparently abandons any attack on the issue of public convenience and necessity.

Appellants' Jurisdictional Statement (pp. 4-6) presents four questions which, in substance, resolve themselves into two general issues, namely:

> 1. Do the principles promulgated by this Court in *Texas & Pacific Ry. Co.* v. *Gulf, C. & S. F. Ry. Co.*, 270 U.S. 266 (1925), with regard to the determination of what is an "extension of line" within the meaning of Section 1(18) of the Interstate Commerce Act, support the determination of the Commission, and the affirmance by the court below, that the proposed trackage is an extension of line over which the Commission has jurisdiction?
>
> 2. Was the court below correct in the scope of judicial review given the Commission's determination that it had jurisdiction?

The subsidiary questions presented by appellants fall under these two general questions.

THE QUESTIONS PRESENTED BY APPELLANTS ARE NOT SUBSTANTIAL AND, AS A PRACTICAL MATTER, HAVE BEEN RENDERED MOOT

Appellants, in substance, are asking this Court to restrict the doctrine of the *Texas & Pacific case* in a manner that would severely limit the jurisdiction of the Interstate Commerce Commission. The Commission has the statutory responsibility for preserving the economic welfare and strength of the railroad transportation industry. It is peculiarly competent to determine whether or not additional railroad construction is necessary or wasteful. Appellants, here, in attempting to have the Commission's jurisdiction drastically restricted, seek to evade the necessity of

obtaining a certificate of public convenience and necessity for new railroad construction, which authority the Commission has denied on the merits.

Furthermore, the issues here are moot, for all practical purposes, since appellants, by means of reciprocal switching, effective October 25, 1957, are able to compete for the traffic at the industries to which they seek to construct new trackage.

STATEMENT OF THE CASE

The facts in this proceeding are not disputed. It is the interpretation and legal significance of these facts which give rise to the questions on appeal. The report of the Commission, at 295 I.C.C. 363 (pp. 364-375), sets forth in detail the findings of fact involving the proposed trackage. We need not repeat here these findings in detail, but for clarity will merely summarize the evidence supporting the more essential findings.

Attached as Appendix A to this motion is a reproduction of Exhibit H-5 from the record before the Commission. It portrays the Boyce area with present trackage, proposed trackage, and the various industries therein. The main line of Southern's affiliate, the CNO&TP, as well as the tracks reaching the industries in the Boyce area, are all owned and operated by CNO&TP as part of Southern Railway System. Hereinafter we will usually refer to this trackage as that of Southern so that references will be consistent with the terminology used by the Commission and the court below.

The proposed line would spring off the main line of appellants approximately 5½ miles north of

the Chattanooga terminus of the appellants' Atlanta-Chattanooga line. The proposed line, shown in yellow on Appendix A, would first cross over 3 main-line tracks of Southern by means of an overhead bridge and proceed 4.04 miles through an industrial territory generally known as the Boyce area and, according to the appellants' plan, crossing at grade, other tracks of Southern at least 4 times (Tr. 53; Ex. H-1, 5 and 6). The proposed line is designed to gain physical access to the industries now located in the Boyce area and physically being served by Southern, as well as any future industries that might locate on industrial land developed by Southern (295 I.C.C. at 365).

The estimated cost of the proposed line is $523,916 and applicants propose to acquire most of the right-of-way by condemnation of land now owned by Southern's real estate subsidiary, Georgia Industrial Realty Company (GIR) (Tr. 23, 56). The estimated cost of the land to be acquired by condemnation from Southern's subsidiary is $125,000 (Tr. 59). The last 2 miles of the proposed 4 miles would be composed of a segment to serve a Quaker Oats plant only and would run, except for a short distance, through land owned by GIR.

The Boyce industrial area contains about 895 acres of industrial property. GIR owns a total of 764 acres of this area which it has acquired for industrial development at a cost of $1,172,842 (Ex. H-5, H-8; 295 I.C.C. at 365).

The record shows that appellants have never served the Boyce industrial area by means of trackage built into this area and that the River track of Southern,

servicing the industries in the Boyce area, has been in existence at least since 1898. The various industries in Boyce have always been served by this track with the exception of the new Quaker Oats plant, which is served by short line springing from Southern's Citico Yard and built in 1952 (Tr. 286).

The recently rebuilt and expanded Citico Yard of Southern Railway System embraces substantial territory in the southeastern portion of the Boyce area. The yard itself is between the main lines of L&N and Southern and the Boyce area, except at the northern portion of the Boyce area. The River track of Southern springs off the Southern main line and proceeds in a southwesterly direction towards the Tennessee River and is shown in yellow on Appendix A. For many years there have been a number of industries served by Southern by means of this River track at Boyce. Proceeding westerly the first two are the Blanchard Company served since at least 1934, and the Chattanooga Royal Company served at least since 1913 (Tr. 286, 320, 321; 295 I.C.C. at 365).

The third industry on the track is the new titanium metal plant of Cramet Company, built in 1954 at a cost of $25,000,000. Adjacent thereto is the proposed site of the Heavy Minerals plant. The fourth industry is H. L. Judd, which has been served by the River track for many years. At the end of the River track is the new plant of Central Soya Company, built in 1954 at a cost of more than $7,000,000 (Tr. 321, 322). Thus, for many years the River track of Southern has been the only line of railroad physically serving the industries on that line. The Quaker Oats plant, built in 1952 at a cost of more than $1,000,000, has been served since its inception by Southern by means

of a short industrial track springing from the southwest side of the Citico Yard (Tr. 281; 295 I.C.C. at 366, 367).

Boyce, Tenn., is a local agency station on Southern 5.5 miles north of Chattanooga. It has been a local station on Southern for over thirty years and Southern has an agency station at Boyce. Some years ago appellants and Southern maintained a joint agency station at Boyce, but this joint agency has been abandoned. *The appellants do not have, nor have ever had, any track physically reaching the industries at Boyce* (Tr. 20, 26, 320).

Exhibit H-13 shows that in 1953 Southern Railway System received gross revenue of $350,812 on inbound and outbound shipments from industries located on the River track and from Quaker Oats. This figure rose to $414,053 in 1954, and for the first six months of 1955 amounted to $204,680. For the three-year period, July 1, 1952, through June 30, 1955, Southern received gross revenue of $1,068,464 from the industries located on Southern's tracks at Boyce.

The Commission found, based upon appellants' evidence, that appellants expect to derive substantial traffic and gross revenue from the plants of Quaker Oats, Central Soya, Cramet and Heavy Minerals as follows, if the proposed track is built (295 I.C.C. at 370):

	Tons of Freight	Gross Freight Revenue
1956	159,273	$ 685,685
1957	178,986	763,426
1958	225,997	932,444
1959	245,773	1,008,496
1960	257,593	1,072,906

Southern owns 764 acres out of a total of about 895 acres of industrial property in the Boyce area suitable for additional industrial development and it is obvious that Southern can expect substantially larger gross revenues than at present if the appellants are not permitted to divert traffic by means of the proposed line (Tr. 327).

Prior to 1939, the Boyce area, while it did have the smaller industries previously referred to on the River track of Southern, was not attractive for large industrial development because of periodic flooding of the Tennessee River. The completion of the Chickamauga Dam by the Tennessee Valley Authority, just north of Boyce, in 1939, removed the danger of flooding and thereafter Southern recognized the industrial potential of this area and proceeded to attempt to locate industries there (295 I.C.C. at 365).

Southern has spent $92,906.61 in constructing turnouts from the River track into the new industries (Ex. H-9).

During this period when Southern was expending these sums with the foresighted determination of protecting this area for industrial development, as distinguished from residential development, the appellants did not spend one cent or make any effort whatsoever to develop the Boyce area for industrial purposes. Witness Whittemore, of appellants, was asked and answered (Tr. 24):

> "Q. * * * It is true, is it not, Mr. Whittemore, that the Nashville, Chattanooga & St. Louis Railway Company has not made any expenditures in this area to develop it for industrial purposes?
>
> "A. That is correct so far.

"Q. In other words, for 15 years since the Chickamauga Dam was built, you have done nothing to develop this as an industrial area?

"A. No, sir."

On the contrary, appellants attempted to forestall certain industries from locating at Boyce which eventually did locate at Boyce on the Southern. Witness Toal, for appellees, testified (Tr. 259):

"Q. Mr. Toal, did Southern Railway suggest and support the area under consideration as a location for the Quaker Oats, Central Soya, and Cramet plants?

"A. Yes. Directly or indirectly, the Southern suggested these sites for all of the recently located industries in the area.

"Q. Did the NC&StL, which now claims it as an area entitled to service by the NC&StL, support these efforts?

"A. It did not. On the contrary, it made every effort to locate the Cramet plant at Nashville, Tennessee; it endeavored to locate the Quaker Oats plant, after a decision had been made to come to the Chattanooga area, near the TVA dock area. I am not familiar with what, if anything, it recommended to Central Soya."

Witness Burke, who was in charge of industrial development for appellants, admitted that appellants attempted to locate Cramet at Nashville, Tenn. (Tr. 109).

The Commission made extensive findings on the evidence submitted both on the jurisdictional issue and on the issue of public convenience and necessity (295 I.C.C. at 375-377 and 365-374 respectively).

THE INTERSTATE COMMERCE COMMISSION WAS CORRECT IN FINDING, AND THE DISTRICT COURT BELOW CORRECT IN AFFIRMING, THAT UNDER THE DOCTRINE OF THE TEXAS & PACIFIC CASE THE COMMISSION HAD JURISDICTION UNDER SECTION 1(18) OF THE ACT

In *Texas & Pacific Ry. Co.* v. *Gulf, C. & S. F. Ry. Co.*, 270 U.S. 266 (1925), this Court set forth the principles governing the determination as to whether a proposed track is an "extension" under Section 1(18). The conclusions of the Court, speaking through Mr. Justice Brandeis, in particular at pages 277-278, have been the governing law since that time.

The doctrine of *Texas & Pacific* has been followed down through the years in the hundreds of cases before the courts and the Commission on the determination of whether a proposed track is an extension, giving the Commission jurisdiction. *Union Pacific R. Co.* v. *Denver & R. G. W. R. Co.*, 198 F.2d 854 (1952); *Southern Pac.* v. *Western Pacific California R.R.*, 61 F.2d 732 (9th Cir. 1932); *Missouri Pac. R.R.* v. *St. Louis Southwestern Ry.*, 73 F.2d 21 (8th Cir. 1934); *Chicago, Milwaukee, St. P. & P. R.R.* v. *Northern Pac. R.R.*, 120 F. Supp. 710 (W.D. Wash. 1954).

The determination whether a proposed track is an "extension" is not a narrow, technical adjudication as appellants argue. Whether a track is substantial or invades new territory adequately served by another carrier requires an evaluation of the economic consequences to the serving carrier and the possibility of wasteful or excessive transportation which may be inimical to the national transportation system.

In *Chicago, M. St. P. & P. R. Co.* v. *Northern Pacific R. Co.*, 120 F. Supp. 710, *affirmed* 225 F. 2d 840 (9th Cir. 1955), the Circuit Court said:

> "It appears to be well settled that the Court must give a liberal or broad construction to the word 'extension' and a limited or narrow construction to the words 'spur' and 'industrial' as applied in the Transportation Act to proposed railroad tracks. Lancaster v. Gulf C. & S. F. Ry. Co., D.C., 298 F. 488 at page 490; Texas & Pac. Ry. Co. v. Gulf, C. & S. F. Ry. Co., 270 U.S. 266, 46 S. Ct. 263, 70 L.Ed. 578; Piedmont & Northern Railway Co. v. Interstate Commerce Commission, 286 U.S. 299 at page 311, 52 S.Ct. 541, 76 L.Ed. 1115; Interstate Commerce Commission v. Piedmont & Northern Railway Co., D.C., 51 F.2d 766 at page 774."

Appellants argue that the *Texas & Pacific case* does not control here because (a) no part of the Boyce area is new territory to appellants; (b) competition is not a factor in appellants' proposal because they already actively compete as originating carrier for the Boyce traffic through reciprocal switching; and (c) the facts and circumstances giving rise to the rule in *Texas & Pacific* were essentially different from those involved at Boyce and consequently furnish no basis for applying it in this case. None of these arguments is sound.

The argument that the *Texas & Pacific* doctrine never comes into play in the present case is based upon the single sentence in Justice Brandeis' opinion which states:

> "If the purpose and effect of the new trackage is to extend substantially the line of a carrier into *new territory*, the proposed trackage constitutes an extension of the railroad, within the meaning

> of paragraph 18, although the line be short and although the character of the service contemplated be that commonly rendered to industries by means of spurs or industrial tracks." (270 U.S., at p. 278.) (Emphasis supplied.)

Appellees answer that the doctrine of *Texas & Pacific* is determined by reading the entire decision. The terms "new territory" and "territory not theretofore served by the carrier" must be defined by the rationale of the entire opinion.

The Commission found, on the facts in the present case, that "the applicant cannot justly claim that the area is within its territory on the strength of the mere showing that it serves the general area. The locations of the industries are such that the applicant's main line would be extended a distance of over four miles in order to reach them." (295 I.C.C. at 377.)

Appellants in their Jurisdictional Statement, page 8, contend that their alleged service in the Boyce area is rendered by (1) a public team track, and (2) reciprocal switching.

The team track argument can be summarily disposed of: A public team track may be used by anyone for the receipt of freight. It is unlikely that the smaller industries at Boyce which have been served by Southern's River track throughout the Boyce area since at least 1898 would choose to take delivery at a team track located some distance away when they were already served by tracks leading into their plants. It is equally unlikely that the large industries which located at Boyce on Southern's tracks beginning in 1952 would ever have occasion to receive their freight upon a team track when they were served by direct

track connections. There is no evidence in the record that any of the industries in the Boyce area specifically used the team track.

Under appellants' argument it would be possible for an industry at Boyce to take delivery on a team track at some distant point in a large metropolitan area like Chattanooga and then argue that since the carrier owning the public team track was, in fact, serving the industry at a distant point it was serving them at Boyce and could build a direct track connection. This argument upon its face would lead to absurd results if used to defeat the jurisdiction of the Interstate Commerce Commission under the *Texas & Pacific* doctrine.

Appellants also argue that they already serve the area by means of reciprocal switching. Reciprocal switching, by which appellants were able to reach the industries in Boyce by using Southern as an agent to do their switching, was applicable to the Boyce industries prior to June 23, 1954, when Southern cancelled reciprocal switching to industries on the River track at Boyce. However, as the result of a complaint to the Commission in Docket No. 31737. *Cramet, Inc.* v. *Alabama-Great Southern R. Co. et al.* (298 I.C.C. 439), the Interstate Commerce Commission ordered the establishment of reciprocal switching on or before October 25, 1957. The Commission's action was upheld in *Southern Railway Co. et al.* v. *United States, et al.*, 154 F. Supp. 562 (U.S.D.C. Va. 1957), which judgment was affirmed by this Court in No. 579 on January 13, 1958 (355 U.S. 370).

The establishment of reciprocal switching to the new industries on the River track at Boyce, in one sense,

makes the appeal in this proceeding moot. When appellants filed their application with the Commission to construct the new trackage into the Boyce area, reciprocal switching was not available to the industries on the River track and was provided only to the Quaker Oats plant in the southwest corner of Boyce, as shown on the map in Appendix A. Thus, appellants have been seeking in two separate proceedings to secure either a new line of railroad into Boyce or reciprocal switching. The Interstate Commerce Commission in its report considered this matter as follows:

> "Witnesses for the industries in the Boyce area have not seriously disputed the adequacy of the Southern's service, and their testimony indicates that they want another line of railroad primarily for bargaining purposes. The industries served by the Southern's river track support the application almost entirely for the reason that they are not accorded reciprocal switching. Practically all of their existing difficulties, including adequate transit privileges, will be satisfied if they are accorded reciprocal switching, and that matter is before the Commission and will be determined in an appropriate proceeding. Vague references to obtaining a more dependable car supply are not convincing." (295 I.C.C. at 378.)

Now that appellants are able to reach the industries at Boyce by using Southern as an agent to switch appellants' cars to the Boyce industries, the pursuance of appellants' application to build a new line of railroad is, in fact, asking this Court to approve a costly duplication, authority for which on the merits has been denied by the Interstate Commerce Commission and upheld by the court below.

The issue as to whether reciprocal switching is the type of "service" which would nullify the rule in *Texas & Pacific* has been passed on in *Missouri Pacific R. Co.* v. *Chicago, R. I. & P. R. Co.*, 41 F.2d 188 (8th Cir. 1930). In that case, the Missouri Pacific sought to build across certain property and tracks of the Rock Island into an industrial area which the Rock Island was serving. *The Missouri Pacific was already able to reach the territory by reciprocal switching performed for it by the Rock Island.* The court cited *Texas & Pacific* as controlling and enjoined the construction unless a certificate of public convenience and necessity was obtained.

More important than any precedent in this matter is the practical effect of adopting the argument of appellants that if there is reciprocal switching into an area, the Interstate Commerce Commission cannot have jurisdiction under the doctrine of *Texas & Pacific* as related to Section 1(18). It is a well-established fact that in most large metropolitan areas today reciprocal switching exists in varying degrees. If appellants' argument is accepted, then it would be possible for any rail carrier, where there was reciprocal switching, to build an extension of railroad to any plant which had reciprocal switching. The Interstate Commerce Commission would never have an opportunity to examine whether such construction would have a disastrous effect upon other rail carriers and would be wasteful and a duplication of facilities.

The doctrine of *Texas & Pacific* in defining the jurisdictional boundaries of the Commission's authority has provided for many years a sound basis for the administration of Section 1(18) and 1(22) of the Interstate Commerce Act. The appellants'

argument would emasculate the powers of the Commission and undo many years of sound judicial and administrative precedent in this important field. The adoption of the appellants' theory would have widespread repercussions in the railroad industry as a whole and cause results that even appellants would not advocate. Furthermore, the national transportation system would be greatly weakened by such unfettered construction and duplication, with the Interstate Commerce Commission powerless to act in the premises.

Appellants' argument that competition is not a factor at Boyce because they already actively compete through reciprocal switching as an originating carrier for the Boyce traffic is disposed of by appellants' own evidence with respect to the large amount of traffic they hope to secure from the new industries in the Boyce area. The Commission found that from 1956 through 1960, appellants expected to derive substantial traffic and gross revenue, increasing each year, as shown by the evidence (295 I.C.C. at 370; Appendix B-11, Jurisdictional Statement). Appellants contend that they are already in competition for this traffic through reciprocal switching. It is obvious that appellants do not think they can secure this substantial traffic without the construction of a new line of railroad. The court below said on this point:

> "The fact remains that the L&N does not consider this service adequate; otherwise it would accept the status quo and not now seek to spend a half million dollars to push its track in the area." (156 F. Supp. at 718).

The argument of appellants is self-defeating for they contend that the territory is not new and that

they are already in position to compete for all the traffic, yet they continue to press for the construction of the new track. Realizing fully that the record would never support a finding of need under public convenience and necessity, they seek to attain this goal by removing the Interstate Commerce Commission from a consideration of the facts.

Appellants' further argument (Jurisdictional Statement, pp. 20-21) that the facts and circumstances in *Texas & Pacific* were different from those involved at Boyce will be commented upon briefly.

Doubtless it would be possible always to distinguish the exact facts in *Texas & Pacific* from the exact facts in any other particular case. However, the doctrine of *Texas & Pacific* must be viewed in its broadest aspect to give any meaningful purpose thereto. The fact that applicant in *Texas & Pacific* had no branch line as near as the line of appellants here to the area sought to be served is not significant. All that appellants really are saying is that because they are closer to Boyce they have a vested right to serve Boyce. The argument that in *Texas & Pacific* the industries sought to be served were well established and long standing, while at Boyce the larger industries are new in the area, is not significant. It is true that the new industries at Boyce are substantial, but they are located on tracks of appellees which have been in service for over a half century. The argument that in *Texas & Pacific* all traffic available to the proposed line would be diverted from the existing carrier, whereas at Boyce this would not be true because appellant is now handling some of the traffic, is not supported by the evidence. The record does show that appellants did receive some traffic from Quaker

Oats under reciprocal switching, but it does not show any traffic from the other industries at Boyce for the simple reason that since the construction of these new industries reciprocal switching was not available until October 25, 1957.

On brief before the Commission and before the District Court these appellees cited a number of cases in which the proposed trackage was found to be within the purview of Section 1(18). The Commission found that the facts involved in the instant proceeding from a jurisdictional standpoint more closely resembled those in *Union Pacific R. Co.* v. *Denver & R. G. W. R. Co.*, 198 F.2d 854 (1952), than the facts in *Pennsylvania R. Co.* v. *Reading Co.*, 226 F.2d 958, affirming 132 F. Supp. 616. A study of the *Union Pacific case* indicates it is more analogous to the case here than either *Pennsylvania* v. *Reading* or *Missouri, K. & T. R. Co.* v. *Texas & N. O. R. Co.*, 172 F.2d 768.

The court below answered the contentions of appellants that the Boyce territory was not "new" territory to the L&N, as follows:

> "* * * We are unable to avoid the conclusion that findings that the proposed expenditures would merely duplicate present facilities and that such unnecessary duplication would be inimical to the public interest has a bearing on our determination of what is a substantial extension into new territory. It is *new territory* to the L&N because the L&N is not now serving it in the sense in which the court used the word 'serve' in the Texas and Pacific case or in the sense in which the Southern is now serving it. It is a *substantial* extension because it involves substantial expenditures and runs a substantial distance. We think that the building of new tracks of significant

mileage comes within the jurisdiction of the Commission when it involves a substantial expenditure of funds to duplicate existing adequate facilities to tap an area of industrial potential which it cannot now serve from its own facilities if such expenditure or the competition resulting therefrom might be a burden on the public. This is such a case.

"The L&N argues that this territory cannot be new to it because it has always held itself out to serve the area both by the presence of its main line, and the team track (which is all that was needed for a century) and because of the reciprocal switching arrangement between it and Southern. The fact remains that the L&N does not consider this service adequate; otherwise it would accept the status quo and not now seek to spend a half million dollars to push its track into the area. Moreover plaintiffs do not take the position that the mere existence of a reciprocal switching agreement constitutes such service as would prevent any area covered thereby from becoming a new territory as to a connecting carrier. Since the reciprocal switching agreement does in the broadest sense of the term result in the L&N 'serving' all the industries that are on the Southern's industrial track within the switching area, this is an implied admission that the term 'serve' in Texas & Pacific means something more than the type of service that is here furnished by it.

"We deduce from the facts in the Texas & Pacific case that the use of the word 'served' there comprehended serving by means of its own substantial facilities which would be expensive to duplicate. In that sense the L&N cannot claim that it is now 'serving' the territory and hence it is not new to it." (156 F. Supp. at 717-718.)

These findings are a sound application of the *Texas & Pacific* doctrine to the facts in the present proceeding and this Court should affirm.

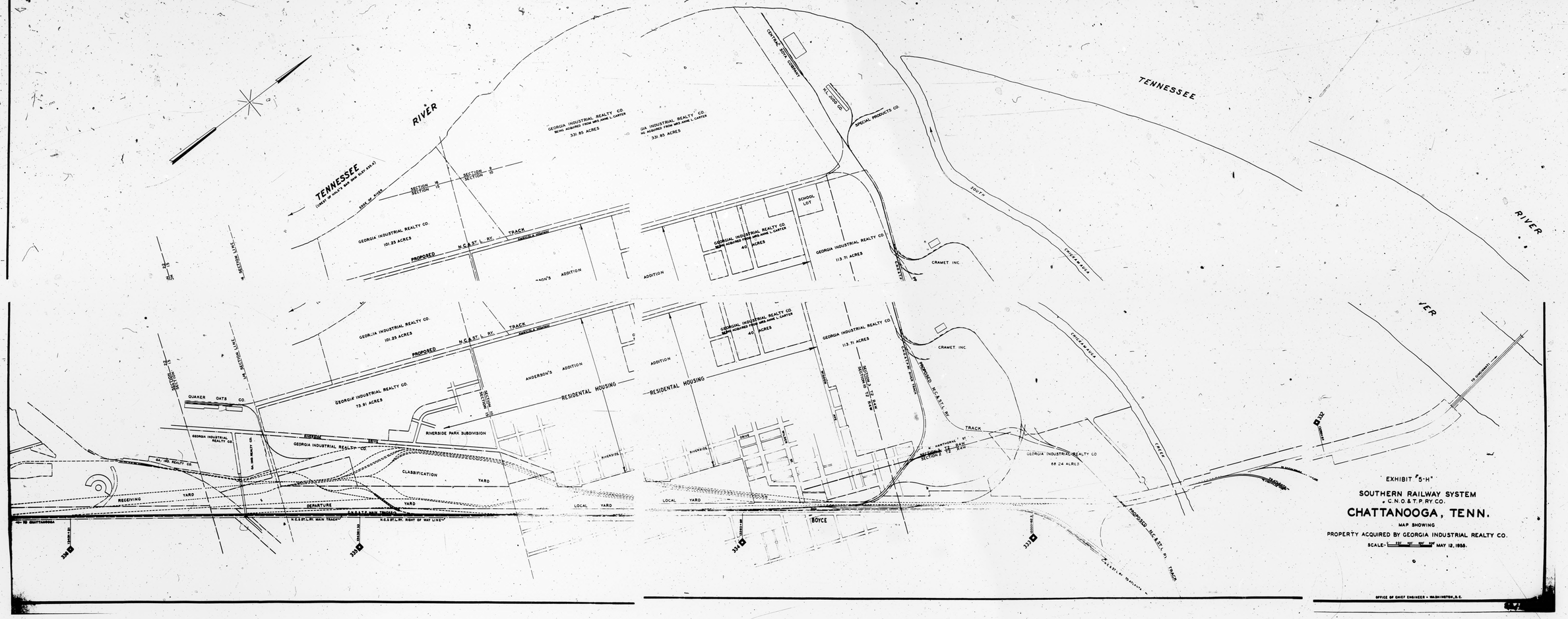
THE FINDINGS OF THE DISTRICT COURT ON THE SCOPE OF JUDICIAL REVIEW OF THE JURISDICTIONAL DETERMINATION BY THE INTERSTATE COMMERCE COMMISSION WERE PROPER AND SHOULD BE AFFIRMED

The District Court considered fully the jurisdictional facts upon which the Commission determined it had jurisdiction. Appellants base their allegation of error on the scope of review on two sentences in the decision, namely:

> "The basic facts on which the jurisdictional question must be resolved are not in dispute. They are supported by substantial evidence and are therefore not subject to review by this Court." (156 F. Supp. at 713.)

However, the District Court made the following additional statements upon the scope of review which are pertinent:

> "We think that when such facts are found by the Commission based on substantial evidence on the record as a whole we may not set them aside. It is clear here that these findings are supported by the evidence. Although these findings were made by the Commission in connection with the merits of the application for certificate of convenience and necessity they stand in the record for whatever purpose they may serve on the jurisdictional question as well."
>
> * * * * *
>
> "We have considered these and the other cases cited by the plaintiffs in support of their conten-


TENNESSEE
(LINE OF STATE BAR BAR 630.0)
STATE OF TENNESSEE
RIVER
GEORGIA INDUSTRIAL REALTY CO.
BEING ACQUIRED FROM MRS ANNE L. CARTER
331.85 ACRES
SECTION 16
SECTION 9
GEORGIA INDUSTRIAL REALTY CO.
101.25 ACRES
PROPOSED N.C.&ST.L. RY. TRACK
CENTRAL SODA COMPANY
L.C.L. 2020 OF
SPECIAL PRODUCTS CO
SCHOOL LOT
GEORGIA INDUSTRIAL REALTY CO.
MRS ACQUIRED FROM MRS ANNE L. CARTER
40 ACRES
GEORGIA INDUSTRIAL REALTY CO
113.71 ACRES
CRAMET INC.
TENNESSEE
RIVER
ANDERSON'S ADDITION
QUAKER OATS CO.
RIVERSIDE PARK SUBDIVISION
RESIDENTIAL HOUSING
CLASSIFICATION YARD
RECEIVING YARD
DEPARTURE YARD
LOCAL YARD
RIVERSIDE DRIVE
BOYCE
PROPOSED N.C.&ST.L. RY. TRACK
TO CHICKAMAUGA
EXHIBIT "5-H"
SOUTHERN RAILWAY SYSTEM
C.N.O.&T.P.RY CO.
CHATTANOOGA, TENN.
MAP SHOWING
PROPERTY ACQUIRED BY GEORGIA INDUSTRIAL REALTY CO.
SCALE: 1" = 100' MAY 12, 1958.
OFFICE OF CHIEF ENGINEER - WASHINGTON, D.C.

> tions that we should determine on the record that this is not an extension of the line of the L&N. In light of the finding of the Commission of the basic facts set out above we do not believe that this case is controlled by any of them. We conclude therefore that the Commission had jurisdiction." (156 F. Supp. at 717, 718.)

Furthermore, the extensive findings of the District Court quoted in the section of this brief immediately preceding show the consideration the District Court gave to the jurisdictional question.

The District Court did not say it had no power to review the Commission's findings on jurisdiction. Furthermore, the District Court said nothing inconsistent with the difference in the scope of review of administrative action involving the exercise of discretion and administrative expertise as distinguished from the scope of judicial review in matters involving jurisdiction. The Court below as well as appellants and appellees in this proceeding recognize these distinctions and there is nothing inconsistent in the action of the Court below with these principles.

The question whether the proposed track is an "extension" is a mixed question of law and fact. *United States* v. *Idaho*, 298 U.S. 105. The jurisdiction of the Commission is thus based upon its findings to which it has applied the law. With the advent of *Gray* v. *Powell*, 314 U.S. 402, this Court commenced a line of decisions that narrowly restricted the power of a court reviewing an administrative action, even with respect to questions that would appear to be more legal than factual.

Appellants urge that the District Court should have conducted what in fact would be a trial *de novo* on the

facts relating to jurisdiction and then determine if the Commission had jurisdiction. It is not necessary in this proceeding to decide, as a pure question of law, whether the District Court has this power. However, assuming that the District Court does have the power to make any inquiry it desires into the facts relating to jurisdiction, it is not error for the District Court on this mixed question of law and fact to take the undisputed findings of fact by the Commission, based upon substantial evidence on the record as a whole, and refuse to overturn these facts or make an independent determination that the facts are as stated by the Commission. The position of the District Court is not inconsistent with the findings of this Court in *United States* v. *Idaho*, 298 U.S. 135 (1936), *East Texas Lines* v. *Frozen Food Exp.*, 351 U.S. 49, 54 (1956), or *Social Security Board* v. *Nierotko*, 327 U.S. 358, 369 (1946).

In this proceeding the appellants went first to the Commission for an adjudication of jurisdiction, and are now claiming that the Commission's findings on jurisdiction have no significance so far as the District Court is concerned. On the mixed question of law and fact the expertise of the Commission in applying the law to the facts in the technical field of railroad regulation should be given very great weight by the Court when the findings are as complete and the evidence supporting them so substantial as it is in this case.

In *Yonkers* v. *United States*, 320 U.S. 685, this Court recognized that the Commission has special competence to deal with transportation problems; and held that the Commission must make jurisdictional findings before it undertakes to act on the merits; which findings give to the reviewing courts the

assistance of an expert judgment on a knotty phase of a technical subject.

In the present case the District Court has, in effect, said that since the Commission had made such complete findings of the facts upon which the jurisdictional issue must be resolved, and since these findings are supported by substantial evidence and not in dispute, that therefore the District Court would accept the Commission's findings. In effect, the District Court adopted the findings of the Commission and the application of the law thereto by the Commission. This course by the District Court was perfectly proper and not, as appellants contend, a refusal of the District Court to make an independent determination on jurisdiction. The District Court was in fact making this determination by accepting the findings of fact and conclusions of law of the Commission.

Acceptance of appellants' argument would render the expertise of administrative agencies a nullity. If reviewing courts could not accept the findings and conclusions of administrative agencies when they were found to be supported by substantial evidence, there would be little need for the administrative agency to make any determination on jurisdiction. In each case the burden of making an independent determination of jurisdiction would be thrown upon the court. Such a result would be contrary to existing laws and judicial determinations of the scope of review of the action of administrative agencies. This does not mean that the courts do not retain full jurisdiction to set aside administrative determinations of jurisdiction if the court finds such administrative determination is clearly erroneous. However, if the findings of fact

on jurisdiction are complete and the application of the law thereto is in accord with established judicial principles, there is certainly no need for a reviewing court to make an independent determination of the facts as found by the administrative agency.

CONCLUSION

The court below subjected the Commission's orders to meticulous review. The court's opinion amply demonstrates this. It is respectfully submitted that the decision below, sustaining the orders of the Interstate Commerce Commission, is correct and that this appeal presents no substantial question. The judgment of the District Court should be affirmed.

Respectfully submitted,

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